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COMPETITION AT THE TELLER'S WINDOW?: ALTERED ANTITRUST STANDARDS FOR BANKS AND OTHER FINANCIAL INSTITUTIONS

Earl W. Kintner* and Joseph P. Bauer**

INTRODUCTION

Congressional and judicial attitudes towards the banking industry have reflected two, sometimes conflicting, goals—the maintenance of the solvency of financial institutions to protect the interests of depositors, other creditors and the economy at large; and the promotion of competition among these institutions and in the economy.¹ The advancement of these goals has been reflected in the application of the antitrust laws to the industry.

For the most part, the Sherman² and Clayton Acts³ apply with the same force and scope to financial institutions as to other industries. In some cases, however, the goal of institutional protection is

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1. See Shull, *The Separation of Banking and Commerce: Origin, Development, and Implications for Antitrust*, 28 ANTITRUST BULL. 225, 256 (1983); see also Loring & Brundy, *The Deregulation of Banks*, 42 WASH. & LEE L. REV. 347 (1985); Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977); Seeley, *Banks and Antitrust*, 21 BUS. LAW. 917 (1966); Wynne & Spagnola, *The Myth of Bank Deregulation*, 42 WASH. & LEE L. REV. 383 (1985); Annotation, *Application to Banks and Banking Institutions of Antimonopoly or Antitrust Laws*, 83 A.L.R. 2d 374 (1962).

2. 15 U.S.C. §§ 1-7 (1982).

3. *Id.* §§ 12-24.

avored, and the antitrust laws are relaxed to a degree.⁴ As an example, the Bank Merger Act⁵ insulates banks to some extent from the full reach of section 7 of the Clayton Act, in the belief that certain mergers will strengthen the banks and will promote the financial well-being of the banks' customers and the community in which they operate. By contrast, in some other cases the goal of advancing competition is elevated, and banks are held to a higher antitrust standard than other industries. For example, certain conditional transactions—tying arrangements, reciprocal dealing or exclusive dealing arrangements—are tested by more stringent standards than those applied to other industries.⁶ This article will first provide an overview of the banking industry in the United States, with an examination of the different kinds of institutions and their services,⁷ and of the different types of banking regulations. An appreciation of the variegated nature of the banking industry will help in evaluating claims either for an antitrust exemption—total or partial—or for higher antitrust standards. The article will then consider three areas of antitrust law in which banks have been singled out for special

4. The fact of governmental regulation may displace normal competitive forces in other ways. In the first instance, entry into and exit from the banking industry is not free; banks must satisfy minimum capital requirements, the officers must meet certain standards, and in some cases (particularly with respect to the opening of branch banks) entry is absolutely precluded by a determination that the banking needs of the area are already satisfied by existing institutions. Even after entry takes place, full competition does not prevail. For example, state usury laws may prevent banks from charging high interest rates which the competitive market would otherwise permit; on the other side of the coin, federal or state authorities may put a ceiling on the rate of interest that institutions may pay to depositors, thus displacing competition for the right to borrow money. As another example, limitations on the number of branches a bank may open, or geographic limitations on the places in which a bank may operate, result in the elimination of competition among banking institutions which might otherwise exist.

5. 12 U.S.C. § 1828(c) (1982).

6. See generally *infra* notes 148-72 and accompanying text.

7. The kinds of services provided by different banking and nonbanking institutions is in considerable flux, and so certain assertions may have to be qualified by later developments. For example, twenty years ago, only commercial banks were able to offer demand accounts, *i.e.*, checking accounts; today, other financial institutions offer similar services, (at least to individuals and not-for-profit organizations), whether credit unions call them "share draft accounts" or savings institutions call them "NOW (negotiable order of withdrawal) accounts." These developments are largely the product of the Depository Institutions Deregulation and Monetary Control Act (Omnibus Banking Act) of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12 U.S.C.), and the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of 12 U.S.C.).

Competition between banking institutions and nonbanks is also increasing. For example, banks frequently offer "discount brokerage services," allowing customers to buy and sell stock, while securities firms (and other nonbanks) offer "money market accounts" with check-writing privileges or act as insurers for credit cards. In short, the relatively clear lines of previous years are fluid and muddled.

treatment—mergers and acquisitions,⁸ interlocking directorates,⁹ and conditional transactions.¹⁰

I. INDUSTRY STRUCTURE AND NATURE OF REGULATION

The American banking industry is a multi-tiered system, with variations both in the kinds of institutions providing different banking services, and in the kinds of agencies responsible for supervising their activities.¹¹ Furthermore, the industry is becoming more complex as traditional banks expand their activities into nonbanking areas at the same time that other institutions expand into areas traditionally occupied only by banks or similar institutions.¹² Some appreciation of this diversity is necessary to understand the different standards under the antitrust laws to which banking institutions may occasionally be subject. For example, not only will the merger of two commercial banks be reviewed by a different agency than the merger of two savings and loan associations, but the standards these agencies apply to determine whether there is an antitrust violation may differ as well.

Banking services are provided both by commercial banks and by thrift institutions. In turn, both of these kinds of institutions may be regulated by the federal and/or a state government.

A "bank" is defined as "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."¹³ Commercial banks, in turn, fall into one of four categories:

8. See generally *infra* notes 33-147 and accompanying text.

9. See generally *infra* notes 148-72 and accompanying text.

10. See generally *infra* notes 173-211 and accompanying text.

11. See generally ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 641-46 (2d ed. 1984); D. COHEN & R. FREIER, THE FEDERAL HOME LOAN BANK SYSTEM (1980); J. NORTON & S. WHITLEY, BANKING LAW MANUAL (1985); W. SCHLICHTING, T. RICE, J. COOPER, & S. CHAZIN, BANKING LAW (1985); Hackley, *Our Baffling Banking System* (pts. 1-2), 52 VA. L. REV. 565, 771 (1966); Norton, *Perspectives on the United States' Banking System*, 12 ANGLO-AM. L. REV. 1 (1983).

12. See *supra* note 7. This article will consider the application of the antitrust laws only to traditional banking institutions, even though nonbanks may perform similar functions. In addition, there are other institutions which provide some of the services of banks—finance companies offer commercial loans, trust companies or other fiduciaries provide trust services, and so forth. These companies, however, are subject to considerably less regulation than banks, and thus should be subject to the antitrust laws to the same extent as the member of any unregulated industry.

See generally *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 106 S. Ct. 681 (1986) (Federal Reserve Board exceeded its statutory authority by promulgating regulation to expand definition of "bank" to include certain "nonbank banks").

13. 12 U.S.C. § 184(c) (1982). Thrift institutions have recently been given authority to offer demand deposit accounts. Their loans, however, are only infrequently of a general commercial nature.

"federal" or "national" banks, and three types of state banks; each of these types is supervised and regulated by different bodies.

First, national banks are chartered pursuant to federal law¹⁴ by the Comptroller of the Currency ("Comptroller"), and are required to become members of the Federal Reserve System. As a result, they are regulated both by the Comptroller and by the Federal Reserve Board.¹⁵ Second, there are banks chartered under the laws of a state which have chosen to become members of the Federal Reserve System; these "state member banks," while not regulated by the Comptroller, are regulated by the Federal Reserve Board as well as by a state regulatory authority.¹⁶ Third, there are state banks which, while not choosing to be members of the Federal Reserve System, have elected to provide insurance to their depositors through the Federal Deposit Insurance Corporation ("FDIC"); these "state nonmember insured banks" are regulated both by the FDIC and by state authorities.¹⁷ Fourth, there are state banks which do not provide federal insurance to depositors; these "state non-member uninsured banks"¹⁸ are regulated only by state authorities.

The term "thrift institution" is used to describe financial institutions which do not share all the characteristics of commercial banks (although in the past decade, legislation has authorized them to undertake far more activities than a traditional nonbank).¹⁹ Thrift institutions fall into three categories—savings and loan associations, mutual savings banks, and cooperative banks or "credit unions." Within each of these three groups, further divisions can be made based on whether the institution is federally or state chartered, and the degree of federal involvement.

Savings and loan associations are nonmutual and noncooperative, *i.e.*, they are not owned by their members, but rather are organized to earn a profit for their stockholders. These institutions originally

14. *Id.* §§ 21-216.

15. *Id.* National banks also provide insurance for their depositors through the Federal Deposit Insurance Corporation (FDIC), but they are not directly regulated by that agency.

16. As with national banks, see *supra* note 15, state member banks also provide insurance through the FDIC to their depositors, but they too are not regulated directly by that agency.

17. This tripartite responsibility over these different types of banks is specified with respect to bank mergers in 12 U.S.C. § 1828(c)(2) (1982). See also *id.* § 1813q (1982 & Supp. III (1986)) (activities of Federal Deposit Insurance Corp.); *id.* § 1882 (responsibility for security measures); *id.* § 3206 (enforcement of prohibitions on certain interlocking directorates).

18. In fact, these "uninsured" banks may provide insurance afforded by a state agency or other body.

19. As noted above, see *supra* note 7, thrift institutions may offer demand accounts having most of the earmarks of a commercial bank checking account. In addition, the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of 12 U.S.C.), provides thrift institutions with significantly enhanced powers formerly characteristic only of commercial banks, including the ability to engage in commercial lending.

were formed to provide financing for the building and purchase of homes; they did not offer demand deposits, and did not make ordinary commercial loans. Savings and loan associations can be chartered either under federal law²⁰ or at the state level. If federally chartered, they are regulated by the Federal Home Loan Bank Board ("FHLBB")²¹ and its subordinate agency, the Federal Savings and Loan Insurance Corporation ("FSLIC").²² As with commercial banks, state chartered savings and loan associations fall into three categories—those which are members of the Federal Home Loan Bank System,²³ subject to regulation by both the FHLBB and state authorities; those which do not choose to become members of the system but seek federal insurance,²⁴ and thus are subject to regulation by the FSLIC and state authorities; and those which choose no federal affiliation, and thus are subject only to state regulation.

Mutual savings banks do not have capital stock represented by shares; rather, ownership of the institution is by the depositors. These savings banks, which were organized originally to provide home financing, can be chartered either under federal or state law. If the institution is federally chartered,²⁵ it is subject, like a federal savings and loan institution, to regulation by the FHLBB. The FDIC provides federal insurance for state mutual savings banks,²⁶ and these banks are subject to regulation by that agency as well as by state authorities.

Cooperative banks, or credit unions, are also organized and operated mutually, and without any capital stock or profit-making motive. Although they have many of the powers of a commercial bank to lend money and afford demand deposits, membership in the cooperative bank is limited by some common bond of occupation, association, or residential location.²⁷ The chartering of a federal credit union falls within the jurisdiction of the National Credit Union Administration ("NCUA"); supervision is by the Administration and the National Credit Union Administration Board.²⁸

20. See generally 12 U.S.C. §§ 1421-1449 (1982) (federal home loan banks); *id.* §§ 1461-1470 (federal savings and loan association).

21. See generally *id.* §§ 1437-1439.

22. See generally *id.* §§ 1724-1730(g).

23. See generally *id.* § 1424(a).

24. See generally *id.* § 1726(a)(2).

25. See generally *id.* § 1424.

26. See generally *id.* §§ 1811-1832. This, as will be noted from the text accompanying note 17, *supra*, is the same coverage as for a state commercial bank, and differs from insurance for a state savings and loan association, which is provided by the FSLIC.

27. See, e.g., 12 U.S.C. § 1759 (1982) ("Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."). See generally Rogow & Edmonds, *Credit Unions: Competition by Statute*, 97 BANKING L.J. 426 (1980).

28. See generally 12 U.S.C. §§ 1751-1790 (1982).

Because Congress has authorized the Board to create and operate a National Credit Union Share Insurance Fund, state chartered credit unions may seek to provide this insurance to their members through the NCUA Central Liquidity Facility.²⁹ As a result, the NCUA and its Board also regulate some of the credit unions' activities.

II. PARTICULAR ACTIVITIES OBTAINING SPECIAL TREATMENT—GENERAL

The majority of activities by banks has been analyzed similarly to comparable activities by other unregulated institutions. Thus, if banks engage in price fixing, concerted refusals to deal, or other prohibited conduct, no automatic exemption from the antitrust laws exists, and the conduct will be tested by generally prevailing standards.³⁰

A few activities, however, have been deemed to affect the balance between the twin goals of ensuring the safety of banking institutions and their depositors, and promoting the goals of competition, and variations from the otherwise prevailing standards are appropriate. In some cases the antitrust strictures are relaxed, as in the case of mergers which may injure competition but which will have an offsetting benefit to the community and the customers served by the merging institutions.³¹ In other cases, more stringent standards will apply; for example, certain conditional transactions which might not be condemned for most industries are prohibited to banking institutions.³² The balance of this article will consider the special treatment under the antitrust laws that has been given to these particular activities by banking companies.

III. MERGERS

A. *Applicable Statutes—Commercial Banks*

There was originally some doubt about the issue, but it is now set-

29. *Id.* § 1781(a).

30. See, e.g., *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973) (concerted refusal to deal), *cert. denied*, 415 U.S. 918 (1974), *noted in*, Note, *Antitrust—Group Boycotts Refusal to Apply the Per Se Rule In the Worthen Case*, 27 ARK. L. REV. 722 (1973); *Brett v. First Fed. Sav. & Loan Ass'n*, 461 F.2d 1155 (5th Cir. 1972) (conspiracy to enforce unlawful "due on sale" clauses); *Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n*, 480 F. Supp. 640 (D. Kan. 1979) (concerted refusal to deal), *aff'd*, 1980-2 Trade Cas. (CCH) ¶ 63,530 (10th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Citicorp. v. Interbank Card Ass'n*, 478 F. Supp. 756 (S.D.N.Y. 1979) (concerted refusal to deal); *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140 (E.D. Pa. 1976) (price fixing); *Bichel Optical Labs, Inc. v. Marquette Nat'l Bank*, 336 F. Supp. 1368 (D. Minn. 1971) (price discrimination).

31. See *infra* notes 33-147 and accompanying text.

32. See *infra* notes 173-211 and accompanying text.

tioned that mergers by banking institutions³³ are subject to the general antitrust provisions regarding mergers and acquisitions³⁴—section 1 of the Sherman Act³⁵ and, of far greater significance, section 7 of the Clayton Act.³⁶ Several factors, however, alter the analysis of proposed acquisitions. On one hand, the loss of competition between banks may have even greater adverse effects on the community and the economy than similar transactions in unregulated sectors; thus, particular vigilance to prevent concentration of banking resources is appropriate. On the other hand, the merger of relatively small banks to form a larger and sounder financial institution can have important advantages to the banks' customers and to the economy.³⁷ Special legislation exists, therefore, which adds additional supervision of proposed bank mergers by the appropriate regulatory agencies, but which may also result in the application of different standards to these transactions.³⁸ These statutes, the Bank Merger Act of 1960³⁹

33. See generally Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297 (1981); Baker, *Potential Competition in Banking: After Greeley. What?*, 90 BANKING L.J. 362 (1973); Carter, *Commercial Banking and the Antitrust Laws*, 11 ANTITRUST BULL. 141 (1966); Casson & Burrus, *Federal Regulation of Bank Mergers*, 18 AM. U.L. REV. 677 (1969); Kintner & Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. INDUS. & COMM. L. REV. 213 (1972); Klebaner, *Potential Competition in Banking and the Supreme Court*, 92 BANKING L.J. 545 (1975); Lifland, *Banking Practices and the Antitrust Laws*, 42 NOTRE DAME L. REV. 465 (1967); O'Connell, *Bank Mergers and Potential Competition*, 43 FORDHAM L. REV. 767 (1975); Solomon, *Bank Merger Policy and Problems: A Linkage Theory of Oligopoly*, 89 BANKING L.J. 116 (1972); Vartanian, *Potential Competition and Bank Mergers: Defense Blueprint for the 1980's*, 99 BANKING L.J. 882 (1982).

34. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

35. 15 U.S.C. § 1 (1982).

36. *Id.* § 18. See generally *United Jersey Banks v. Parell*, 783 F.2d 360 (3d Cir. 1986) (possible preemptive effect by Sherman and Clayton Acts of state laws regulating bank mergers).

37. The advantages to competition and to the community from bank mergers are often similar to those from mergers in unregulated sectors, but sometimes they may also transcend them. Of course, mergers by smaller banks can enable them better to compete with larger institutions, affording better management opportunities, economies of scale, and so forth. Larger banks may offer a greater variety of customer services, or be able to diversify their loans and investments. The merger of a weak bank with another institution will protect its depositors from potential loss, a larger concern in the banking industry than would be the demise of a "failing company" in another industry. In addition, mergers can aid depositors and borrowers in special ways. The lending capacity of banks is limited by a variety of state and federal laws. See, e.g., 12 U.S.C. § 84(a) (1982). As a result of a merger, the new institution can offer larger loans to individual customers, who might otherwise have to turn to banks in other areas of the country. *But see Philadelphia Bank*, 374 U.S. at 370-71 (rejecting argument). Similarly, statutory prohibitions on branch banking may make mergers the only way in which a bank can engage in geographic expansion. See *United States v. Marine Bancorporation*, 418 U.S. 602 (1974) (upholding merger where state law prohibited banks from opening branches in geographic areas distant from home office).

38. See generally *Marine Bancorporation*, 418 U.S. at 628-29.

39. Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c) (1982 & Supp. III (1986))). The legislative history of this statute may be found in H.R. REP.

and the Bank Merger Act of 1966,⁴⁰ specify detailed procedures for review of bank mergers and identify additional factors, beyond the standard Sherman and Clayton Act provisions, to be considered in that review.

The applicability of section 7 of the Clayton Act to bank mergers was resolved by the landmark Supreme Court decision, *United States v. Philadelphia National Bank*.⁴¹ The statute generally makes unlawful certain anticompetitive *stock* acquisitions; it also makes unlawful similar *asset* acquisitions, but only by corporations subject to the jurisdiction of the Federal Trade Commission. Since the FTC has no jurisdiction over banks,⁴² it is clear that section 7 does not apply to *asset* acquisitions.⁴³ Because section 7 makes no reference to "mergers" (nor to "consolidations"),⁴⁴ it was uncertain whether the Clayton Act applied to bank mergers. In *Philadelphia Bank*, the Court, based on an examination of legislative history, legislative intent, and principles of statutory construction, concluded that the exclusion in section 7 respecting corporations subject to FTC jurisdiction applied only to asset acquisitions. Other transactions, including mergers and consolidations, were held to be within the purview of the Clayton Act.⁴⁵ Then, in a case decided in the following Term, the Court held that section 1 of the Sherman Act also applies to bank mergers.⁴⁶

No. 1416, 86th Cong., 2d Sess., reprinted in 1960 U.S. CODE CONG. & ADMIN. NEWS 1995-2008.

40. Pub. L. No. 89-356, 80 Stat. 7 (1966) (codified at 12 U.S.C. § 1828(c) (1982)).

41. 374 U.S. 321 (1963); see also *United States v. Chelsea Sav. Bank*, 300 F. Supp. (D. Conn. 1969) (Clayton § 7 also applies to acquisitions of (nonstock) mutual savings banks).

42. See 15 U.S.C. § 45(a)(2) (1982); *Philadelphia Bank*, 374 U.S. at 336 & n.11.

43. 374 U.S. at 336.

44. See *id.* at 332 n.7.

45. "[T]he specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger." *Id.* at 342.

The Court's holding that Clayton Act § 7 applied to bank mergers sparked two dissents, one by Justice Harlan (joined by Justice Stewart), see *id.* at 373-96, the other by Justice Goldberg, see *id.* at 396-97. Since Justice White took no part in the decision of the case, the holding was the product of a 5-3 split in the Court.

In light of the Court's determination that § 7 reached this transaction, it was unnecessary to "reach the further question of alleged violation of § 1 of the Sherman Act." *Id.* at 324. For cases that did decide the issue relating to a violation of § 1 of the Sherman Act, see *infra* note 46 and accompanying text.

46. *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964); see also *United States v. Central State Bank*, 564 F. Supp. 1478 (W.D. Mich. 1973); *United States v. Owensboro Nat'l Bank*, 1972 Trade Cas. (CCH) ¶ 73,789 (W.D. Ky. 1972). See generally Klebaner, *The Lexington Merger Decision and Its Significance for Commercial Banking*, 11 ANTITRUST BULL. 897 (1966).

Some cases are brought under both Clayton § 7 and Sherman § 1, with courts applying similar standards of legality under both statutes. See, e.g., *United States v. Mercantile Trust Co.*, 263 F. Supp. 340 (E.D. Mo. 1966), *rev'd*, 389 U.S. 27 (1967); *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D.N.Y. 1965).

In the *Philadelphia Bank* case, the Supreme Court further held that the Bank Merger Act of 1960 did not diminish the scope of the general antitrust laws in challenging bank mergers, nor did it affect the jurisdictional reach of the courts in weighing such challenges. The 1960 Act had established a procedure for administrative review (and approval) of bank mergers. The Act required the written consent of the appropriate agency, according to the tripartite responsibility described above,⁴⁷ prior to any bank merger or consolidation. In order to obtain uniformity in applying the standards, the Act required that, prior to making the determination, the agency was to obtain recommendations from the other two named agencies and from the Attorney General. In its decisionmaking process, the responsible agency was required to weigh a number of factors, including "the convenience and needs of the community to be served" and "the effect of the transaction on competition (including any tendency toward monopoly)."⁴⁸

The Court in *Philadelphia Bank* held that the existence of the Bank Merger Act did not immunize bank mergers from general and unaltered antitrust scrutiny. Immunity from the antitrust laws is to be granted only in limited cases and only when necessary to prevent disruption of the regulatory structure. Regulation of banks is far more limited than that of other industries; immunity is hardly necessary to effectuate that limited regulation; and the two statutory schemes, the antitrust laws and the Bank Merger Act, do not reflect unrelated or inconsistent policy goals.⁴⁹ Indeed, the Court was so committed to the application of the antitrust regime that, in dictum, it even rejected the possible application of the "primary jurisdiction" doctrine, because the input of the agencies would be of limited impact or utility, and would serve only to attenuate or postpone the determination of the merits.⁵⁰

Partly in response to the Supreme Court's rejection in *Philadelphia Bank* of any special treatment for mergers involving banking institutions, Congress amended the Bank Merger Act in 1966.⁵¹ The revised statute provides more detailed criteria for the ap-

47. See *supra* note 15 and accompanying text. Responsibility for reviewing proposed mergers is divided among the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation.

48. 12 U.S.C. § 1828(c) (1982).

49. *Philadelphia Bank*, 374 U.S. at 350-55.

50. *Id.* at 353-54.

51. Pub. L. No. 89-356, 80 Stat. 7 (1966) (codified at 12 U.S.C. § 1828(c) (1982)). For the legislative history of this statute, see H.R. REP. NO. 1221, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 1860-87; some of this history is also described in *United States v. Crocker-Anglo Nat'l Bank*, 263 F. Supp. 125, 128-32 (N.D. Cal. 1966); see also Searls & Reasoner, *The Bank Merger Act of 1966—Its Strange and Fruitless Odyssey*, 25 BUS. L. 133 (1969); Comment, *The 1966 Amendment to the Bankruptcy Act*, 66 COLUM. L.

plication of antitrust considerations to bank mergers. Perhaps more significantly, it also requires the agencies and the courts to consider factors beyond the mere impact on competition of the transaction in determining their legality under the antitrust laws, and further provides that failure by the Justice Department to initiate a challenge to a merger within a short period of time after its approval by the responsible agency will foreclose a subsequent attack on the merger.

The 1966 Act preserved the basic procedure specified in the 1960 Bank Merger Act. Responsibility for reviewing and approving a proposed merger continues to be divided among three governmental bodies,⁵² with the responsible agency seeking input from the Attorney General and the other two agencies, in an attempt to achieve uniform standards.⁵³

In a sense, the 1966 Act provides a two-step process for the evaluation of a proposed acquisition. First, it specifies, in somewhat more detail than the 1960 Act, the balancing of the adverse effect on competition that the agency should undertake. Second, it provides that, unlike a merger in another setting, even an *anticompetitive* bank merger may be approved if the responsible agency "finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."⁵⁴

In the *Philadelphia Bank* case, the Court concluded that approval by the responsible agency was irrelevant to a subsequent judicial challenge. It held that the antitrust laws applied with full force to bank mergers, and that agency approval pursuant to the Bank Merger Act of 1960 did not foreclose full, de novo review of the transaction under the different standards of the antitrust laws.⁵⁵ The 1966 Act, however, contains two additional provisions which affect judicial challenges to a proposed acquisition. First, the transaction must be challenged by the Justice Department within a short time of its approval by the responsible agency—normally within thirty

REV. 764 (1966), reprinted in 83 BANKING L.J. 753 (1966); Note, A Legislative History of the 1960 Bank Merger Act and Its 1966 Amendment; Judicial Misuse and a Suggested Approach, 44 IND. L.J. 596 (1969); Legislation, *The 1966 Amendment to the Bank Merger Act: Economic Perspective and Legal Analysis*, 20 VAND. L. REV. 200 (1966).

52. 12 U.S.C. § 1828(c)(2) (1982); see also *supra* note 17.

53. The Act also provides for publication of a notice of the proposed transaction in newspapers in the community where the transaction will take place, 12 U.S.C. § 1828(c)(3), although no requirement of public hearing, or even consideration of the comments received from the public, is found in the statute. But see *Bank Regulations Employ Distinct Competitive Analyses for Mergers*, 48 Antitrust & Trade Reg. Rep. (BNA) 802 (Apr. 4, 1985).

54. 12 U.S.C. § 1828(c)(5)(B) (1982).

55. *Philadelphia Bank*, 374 U.S. 350-55; see *supra* notes 47-49 and accompanying text.

days.⁵⁶ Second, a court is to apply the same standards as those used by the agency. That means, of course, that a court must weigh the "convenience and needs defense" even in a merger which has otherwise clear anticompetitive effects.⁵⁷

At about the same time that the Bank Merger Act was amended in 1966⁵⁸ to prescribe procedural requirements and substantive standards for bank mergers,⁵⁹ the Bank Holding Company Act of 1956⁶⁰ also was revised to incorporate virtually identical procedures and standards⁶¹ with respect to bank holding company transactions.⁶² The statutory requirements apply to a variety of transactions, including the acquisition by a bank holding company of a bank or its assets, the merger with another bank, or the conversion of a bank into the subsidiary of a bank holding company.⁶³

All such transactions involving bank holding companies must be approved by the Board of Governors of the Federal Reserve System. The Board must give notice to, and then receive input from, the Comptroller of the Currency for national banks or the appropriate

56. 12 U.S.C. § 1828(c)(7) (1982). In normal cases, the transaction may not be consummated before 30 days after the date of approval by the agency. However, if the responsible agency determines that there is an emergency requiring expeditious action (and so notifies the Attorney General and the other two banking agencies), then the transaction may be consummated five days after the approval by that agency. *Id.* § 1828(c)(6). In any event, any action by the Justice Department to challenge the merger must be brought within that statutory period; otherwise, "the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than [Sherman Act] section 2." *Id.* § 1828(c)(7)(C). If an action is brought by the Justice Department within the 30 (or five) day period, consummation of the transaction is automatically stayed unless the court provides otherwise. *Id.* § 1828(c)(7)(A); see also *infra* notes 67-68, 113 (discussing stay provision).

57. "In any judicial proceeding attacking a merger transaction approved [by the responsible agency], . . . the standards applied by the court shall be identical with those that the banking agencies are directed to apply. . . ." 12 U.S.C. § 1828(c)(7)(B) (1982). The statute also provides that if an action challenging the merger is brought by the Department of Justice, the approving federal supervisory agency (and any state banking supervisory agency having jurisdiction within the state involved) may intervene as a party as a matter of right. *Id.* § 1828(c)(7)(D).

58. Pub. L. No. 89-356, 80 Stat. 7 (1966) (codified at 12 U.S.C. § 1828(c) (1982)).

59. See *supra* notes 51-53 and accompanying text.

60. Act of May 9, 1956, Pub. L. No. 54-511, 70 Stat. 133-146 (codified as amended at 12 U.S.C. §§ 1841-1849 (1982)).

61. See *Mercantile Tex. Corp. v. Board of Governors*, 638 F.2d 1255, 1260-61 (5th Cir. 1981) (legislative history evidences intent to adopt identical standards).

62. Act of July 1, 1966, Pub. L. No. 89-485, 80 Stat. 236-240 (codified at 12 U.S.C. §§ 1841, 1842, 1843, 1848, 1849 (1982 & Supp. III (1986))). A "bank holding company" is defined as "any company which has control over any bank or over any company that is or becomes a bank holding company." 12 U.S.C. § 1841(a)(1) (1982).

63. 12 U.S.C. § 1842(a) (1982). See generally Note, *The Bank Holding Company Act Amendments of 1970*, 39 GEO. WASH. L. REV. 1200 (1971).

supervisory authority for state banks.⁶⁴ The substantive standards that the Board must weigh are identical to those governing banks,⁶⁵ including the defense of the "probable effect of the transaction in meeting the convenience and needs of the community to be served."⁶⁶ As with banking institution transactions,⁶⁷ any challenge to a bank holding company acquisition must be instituted within a relatively short, defined period;⁶⁸ furthermore, in any judicial challenge, the court, while reviewing de novo the issues presented, is required to apply the same standards to the transaction as those considered by the Board.⁶⁹

B. Varying Standards of Legality—Commercial Banks

In light of this dual statutory regime—the general antitrust laws (the Sherman and Clayton Acts) apply to bank mergers, but the Bank Merger Act and the Bank Holding Company Act specify different review procedures and different substantive standards—a number of related questions arise. How should the proposed merger of banking institutions be tested under the antitrust laws? How do the special banking statutes alter the substantive standards? Should the proposed merger of two banks be subjected to higher thresholds? How are the defenses identified in these statutes balanced against general antitrust considerations?

Since its *Philadelphia National Bank*⁷⁰ decision, the Supreme

64. 12 U.S.C. § 1842(b) (1982); *cf. id.* § 1828(c)(2) (divides responsibility for approving bank mergers among Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation).

65. *See id.* § 1828(c)(5) (discussed *supra* text accompanying note 54).

66. *Id.* § 1842(c).

67. *See supra* notes 56-57 and accompanying text; *see also* *Vial v. First Commerce Corp.*, 564 F. Supp. 650, 665-68 (E.D. La. 1983) (automatic stay provision in Bank Merger Act, 12 U.S.C. § 1828(c)(7)(A) (1982), applies only to government actions, and not to challenges by private individuals); *First Midland Bank & Trust Co. v. Chemical Fin. Corp.*, 441 F. Supp. 414, 421-23 (W.D. Mich. 1977) (same) (supplemental opinion); *cf. United States v. National Bank & Trust Co.*, 319 F. Supp. 930 (E.D. Pa. 1970) (stockholder of one of two merging trust companies may not intervene as a matter of right under FED. R. CIV. P. 24 to set aside consent decree between banks and federal government).

68. *See United States v. Michigan Nat'l Corp.*, 419 U.S. 1 (1974) (challenge to bank holding company transaction requiring approval of both Federal Reserve Board and Comptroller of the Currency may be brought immediately upon approval by one agency without waiting for possible disapproval by other agency; thirty day period for filing suit might be triggered by first approval, making later challenge after second agency's action untimely).

69. 12 U.S.C. § 1849(b) (1982); *see also infra* note 117; *cf. Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1186-87 (10th Cir. 1983) (national bank and chairman of its board of directors lack standing to raise anticompetitive concerns in challenge to acquisition of national bank by principal stockholder of a bank holding company).

70. 374 U.S. 321 (1963).

Court has consistently taken the position that the general antimerger statutes govern commercial banking.⁷¹ The same method of analysis used for acquisitions in unregulated sectors of the economy will apply to bank acquisitions as well.⁷² Thus, one must first determine the relevant markets—the product market and the geographic market—within which the transaction may diminish competition. Then, applying appropriate theories—based in large part on whether the acquisition involves a horizontal merger or a geographic extension merger—one must determine what the probable effect on competition will be.

1. Product Market

The *Philadelphia Bank* case involved the proposed merger of the second and third largest commercial banks in the Philadelphia metropolitan area. In evaluating the legality of the transaction, the Court held that “the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking’ . . . comprises a distinct line of commerce”⁷³ for section 7 purposes.⁷⁴ The Court’s conclusion was based on the uniqueness of some of these services, for example, checking accounts, which were not offered by any other financial institutions; on the cost advantages that commercial banks enjoyed with respect to other services for which competition existed, for example, making personal loans; and on consumer preferences for the provision of certain services by commercial banks, for example, savings deposits, even though other institutions competed fully and freely in these areas.⁷⁵

71. See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 626-27 (1974); *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350, 353 (1970); *United States v. Third Nat’l Bank*, 390 U.S. 171, 181-83, (1968); see also *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120-22 (1975).

72. See generally IV E. KINTNER, *FEDERAL ANTITRUST LAW* chs. 33-38 (1984).

73. 374 U.S. at 356.

74. See *United States v. Connecticut Nat’l Bank*, 418 U.S. 656, 663 (1974) (“the absence of a ‘line of commerce’ phrase in the Bank Merger Act of 1966 [does not] alter[] traditional standards under § 7 of the Clayton Act for defining the relevant product market in a bank merger case.”).

75. See 374 U.S. at 356-57. The Court noted “that many other institutions are in the business of supplying credit, and so more or less in competition with commercial banks . . . for example: mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, life insurance companies.” *Id.* at 327 n.5. See generally Weston & Hoskins, “Line of Commerce” and Commercial Banking, 42 S. CAL. L. REV. 225 (1969).

A broader definition of the relevant product market, to include other financial institutions offering the same products and services, would result in the approval under the Clayton Act of a greater number of bank mergers.⁷⁶ The Supreme Court, however, has adhered to its *Philadelphia Bank* holding that commercial banking is itself a relevant market for analytical purposes,⁷⁷ even in the face of suggestions that some commercial bank mergers should be treated differently. Thus, in *United States v. Phillipsburg National Bank & Trust Co.*,⁷⁸ which involved the merger of two very small banks in a small community,⁷⁹ the district court had concluded that since these commercial banks functioned in many ways like savings banks, those institutions should be included within the relevant product market.⁸⁰ The Supreme Court rejected this conclusion and repeated its prior holding that the products and services offered by commercial banks were sufficiently unique as to make commercial banking a "distinct line of commerce," or a "relevant market," for testing the legality of a merger of two such institutions.⁸¹

More recently, several commentators have suggested that recent financial and legislative developments require a redefinition of the relevant product market for evaluating mergers of commercial banks.⁸² The passage in 1980 of the Depository Institutions

76. The larger the product market, the smaller the percentage market share of that market which will be accounted for by the two firms whose transaction is under scrutiny. Given the great importance given to this resultant market share, see *infra* notes 99-102 and accompanying text, this diminished percentage will enhance the likelihood of agency and judicial approval of the merger.

77. See *United States v. Marine Bancorporation*, 418 U.S. 602, 618-19 & n.16 (1974); *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171, 182 n.15. (1968).

78. 399 U.S. 350 (1970).

79. "[M]easured by trust assets, the Phillipsburg National Bank in 1968 ranked 1346th and the Second National Bank of Phillipsburg 2429th out of the approximately 3100 banks with trust powers in the United States. If the two banks were merged, the resulting bank would have ranked 1323d—only 23 places ahead of the Phillipsburg National alone." *Id.* at 373-74 (Harlan, J., concurring in part and dissenting in part) (footnote omitted). The geographic market used to test the merger was a "metropolis" of less than 90,000 people. See *id.* at 362-65.

80. 306 F. Supp. 645, 646-51 (D.N.J. 1969), *rev'd*, 399 U.S. 350 (1970).

81. 399 U.S. at 359-62; see also *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 660-66 (1974); *cf.* *United States v. Central State Bank*, 621 F. Supp. 1276, 1290-92 (W.D. Mich. 1985) (using similar analysis to evaluate individual defendant's joint control of two rural banks, challenged under Sherman § 1).

82. See, e.g., Alcaly & Nelson, *Will Including Thrifts in the Banking Market Affect Mergers?*, 97 BANKING L.J. 346 (1980); Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297, 366-67 (1981); Bleier & Eisenbeis, *Commercial Banking As the "Line of Commerce" and the Role of Thrifts*, 98 BANKING L.J. 374 (1981); Jung, *Banking Mergers and "Line of Commerce" After the Monetary Control Act: A Submarket Approach*,

Deregulation and Monetary Control Act⁸³—better known as the Omnibus Banking Bill of 1980—significantly expands the opportunities for other financial institutions to engage in activities formerly limited only to commercial banks. For example, the *Philadelphia Bank* Court relied in part on the fact that only commercial banks could offer checking accounts; today, however, thrift institutions can offer interest-bearing demand accounts,⁸⁴ and credit unions can offer “share draft accounts,” which also pay interest and closely resemble checking accounts. Other changes in the economy and governing statutes, ranging from the offering of money market accounts by securities firms to the removal of restrictions on the amount of interest that financial institutions can pay to their customers, further reduce the uniqueness or commercial advantage of the products and services offered by commercial banks. In fact, several district courts have held that the relevant product market in assessing bank mergers should be larger than simply commercial banking;⁸⁵ the Supreme Court, while not yet overruling its prior decisions, has itself indicated that under proper circumstances a broader product market definition might be appropriate.⁸⁶

1982 U. ILL. L. REV. 731; Via, *Commercial Banking As the “Line of Commerce” in Bank Amalgamations: A Reexamination*, 99 BANKING L.J. 326 (1982); Note, *The Line of Commerce for Commercial Bank Mergers: A Product-Oriented Redefinition*, 96 HARV. L. REV. 907 (1983).

83. Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C.).

84. These are often offered under the acronym “NOW” accounts, standing for “negotiated order of withdrawal.”

85. *United States v. Connecticut Nat’l Bank*, 362 F. Supp. 240, 281 (D. Conn. 1973), vacated, 418 U.S. 656 (1974); *United States v. First Nat’l Bancorporation*, 329 F. Supp. 1003, 1017 (D. Colo. 1971), *aff’d* 410 U.S. 577 (1973); *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 306 F. Supp. 645, 651-55 (D.N.J. 1969), *rev’d*, 399 U.S. 350 (1970); *see also* *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350, 379-82 (1970) (Harlan, J., concurring in part and dissenting in part).

86. *Connecticut Nat’l Bank*, 418 U.S. at 666. The Court stated:

We do not say, and *Phillipsburg National Bank* . . . and *Philadelphia National Bank* . . . do not say, that in a case involving a merger of commercial banks a court may never consider savings banks and commercial banks as operating in the same line of commerce, no matter how similar their services and economic behavior. At some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act. In Connecticut, that point may well be reached when and if savings banks become significant participants in the marketing of bank services to commercial enterprises. But, in adherence to the tests set forth in our earlier bank merger cases, which we are constrained to follow, we hold that such a point has not yet been reached.

Id. But *see* *United States v. First Nat’l State Bancorporation*, 499 F. Supp. 793, 810-11 (D.N.J. 1980) (developments since *Connecticut Nat’l Bank* still not enough to expand relevant market beyond commercial banking).

2. Geographic Market

In evaluating the impact on competition of a proposed bank merger, courts must also determine the relevant "section of the country"—the geographic market—within which to test the transaction. Unlike the determination of the relevant product market, where courts have not made distinctions based on the type of merger in question, the definition of the relevant geographic market will depend in part on whether the acquisition involves a horizontal merger—two banks formerly in competition with one another—or a geographic extension merger.

In *Philadelphia Bank*, a horizontal merger case, the Court provided a test for determining the relevant geographic market: "The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."⁸⁷ Since the principal concern in a horizontal merger is the injury to those customers who no longer obtain the benefits of the competition that previously existed between the parties to the merger, it is relevant to determine where those customers operated and where they can turn for alternatives. In the banking industry, the difficulty of making this determination is compounded by the varying size and nature of the banks' customers; therefore, some compromise or intermediate approximation is needed. The surrogate will often be the place where the banks' offices are located, and the areas in which the bulk of their business originates.⁸⁸

This general approach to determining the relevant market was repeated in the *Phillipsburg Bank* case.⁸⁹ In that case, the merging banks operated in a small community that was part of a somewhat larger region. The district court had broadly defined the relevant market as the larger metropolitan area, but the Supreme Court rejected that definition. The Court looked particularly to "the market area in which [the two banks] operate, and . . . the area in which most of the merging banks' customers must, or will, do their banking."⁹⁰ The Court stressed the narrowness with which the market

87. 374 U.S. at 357; accord, *Connecticut Nat'l Bank*, 418 U.S. at 667-68.

88. 374 U.S. at 357-62; see also *Southwest Miss. Bank v. FDIC*, 499 F. Supp. 1, 8-14 (S.D. Miss. 1979), *aff'd mem.*, 625 F.2d 1013 (5th Cir. 1980); cf. *United States v. Central State Bank*, 621 F. Supp. 1276, 1292-94 (W.D. Mich. 1985) (using similar analysis to evaluate individual defendant's joint control of two rural banks challenged under Sherman § 1).

89. 399 U.S. at 362-65, noted in, Note, *U.S. v. Phillipsburg National Bank: A Consideration of Commercial Banking as the Relevant Line of Commerce in Small Bank Situations*, 46 IND. L.J. 348 (1971).

90. *Id.* at 365.

could be delineated, especially when the merger occurred in a small geographic area: "Commercial realities in the banking industry make clear that banks generally have a very localized business;"⁹¹ these localized operations justified the conclusion that even limited areas are "clearly an economically significant section of the country for the purposes of § 7."⁹²

In *United States v. Marine Bancorporation*,⁹³ the Supreme Court considered the Justice Department's challenge to the acquisition by the second largest bank in Seattle, Washington, of the third largest bank in Spokane.⁹⁴ The Court held that the relevant geographic market for testing the legality of a geographic extension merger, where the merging parties were not previously direct competitors and one company was expanding into either a distant or an adjacent geographic market, is the area in which the *acquired* company operates.⁹⁵ While conceding that this was a relevant market, the Government had argued that the entire State of Washington was also a "section of the country" for section 7 purposes. The Court rejected this alternative, and instead favored the approach taken in previous horizontal bank merger cases: focusing on the place where affected customers can turn for alternatives, and where "the effect of the merger on competition will be direct and immediate."⁹⁶

3. Effect on Competition

In assessing the impact on competition of the merger of two banks, the transaction is not treated much differently than a merger

91. *Id.* at 362.

92. *Id.* at 365. The Court stressed that, as was also true in *Philadelphia Bank*, the geographic area chosen was one that the relevant federal banking agencies—the Federal Reserve Board and the FDIC—as well as the Attorney General deemed to be an "area of effective competition." *Id.* at 364; *cf.* 374 U.S. at 361; *see also* *United States v. County Nat'l Bank of Bennington*, 339 F. Supp. 85, 90 (D. Vt. 1972) ("Bennington area," with population of 23,733, was a relevant "section of the country"); *cf.* *Mid-Nebraska Bancshares, Inc. v. Board of Governors*, 627 F.2d 266, 270 (D.C. Cir. 1980) (relevant market was combination of two adjacent small towns where banks operated, rather than two separate markets; hence, merger was horizontal rather than geographic extension); *United States v. Virginia Nat'l Bankshares, Inc.*, 1982-2 Trade Cas. (CCH) ¶ 64,871 (W.D. Va. 1982) (government failed to satisfy its burden of proof that entire country constituted a single relevant geographic market).

93. 418 U.S. 602 (1974).

94. *See generally* IV E. KINTNER, *supra* note 72, § 36.21.

95. 418 U.S. at 622 ("We hold that in a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor."); *accord*, *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 667 (1974).

96. 418 U.S. at 619; *accord*, *Connecticut Nat'l Bank*, 418 U.S. at 672-73; *see also* *United States v. First Nat'l State Bancorporation*, 499 F. Supp. 793, 811-12 (D.N.J. 1980).

in an unregulated industry,⁹⁷ with the exception of the potential allowance of the "convenience and needs" defense discussed below.⁹⁸ That banks are involved is, at best, an additional factor in assessing the nature of the market, the importance of preserving competition, and the possibility of achieving competitive goals by other means (including de novo entry or expansion by one of the existing parties or entry into the market by acquiring another, smaller bank).

Philadelphia Bank is one of the leading cases describing the general approach to evaluating the legality of a horizontal merger. There, the Court established a rebuttable presumption approach to evaluating such transactions, stressing that two factors were key in determining the merger's likely effect on competition: the percentage share of the market controlled by the resultant merged firm and a significant increase in the concentration of firms in the market.⁹⁹ This approach was reaffirmed in the *Phillipsburg Bank* case¹⁰⁰ and subsequent decisions,¹⁰¹ and remains viable, even if modified and refined, in the Department of Justice's Merger Guidelines.¹⁰²

The case law indicates that, merely because the transaction involves two banks, the substantive standards under section 7 of the Clayton Act (as opposed, perhaps, to the relaxation permitted by the Bank Merger Act) should be neither more relaxed nor more stringent.

On one hand, in *Philadelphia Bank* the Court "reject[ed] the position that commercial banking, because it is subject to a high degree

97. See *supra* notes 70-72 and accompanying text.

98. See *infra* notes 111-30 and accompanying text.

99. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). The Court stated: We think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Id. See generally Note, *The Line of Commerce for Commercial Bank Mergers: A Product Oriented Redefinition*, 96 HARV. L. REV. 907 (1983); Case Comment, 5 WM. & MARY L. REV. 280 (1964).

100. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 366 (1970). See generally Alcorn, *Phillipsburg and Beyond—Developing Trends in Substantive Standards for Bank Mergers*, 9 HOUS. L. REV. 417 (1972); Darnell, *The Phillipsburg National Bank Case*, 16 ANTITRUST BULL. 33 (1971); Note, 25 SW. L.J. 317 (1971).

101. See, e.g., *Mid-Nebraska Bancshares, Inc. v. Board of Governors*, 627 F.2d 266, 270-71 (D.C. Cir. 1980).

102. *Justice Dep't Merger Guidelines*, Antitrust & Trade Reg. Rep. (BNA) No. 1169 (Spec. Supp.) (June 14, 1984); see *United States v. Central State Bank*, 621 F. Supp. 1276, 1294-95 (W.D. Mich. 1985) (using Department's Guideline standards to evaluate individual defendant's joint control of two rural banks, challenged under Sherman § 1).

of governmental regulation, or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is somehow immune from the anticompetitive effects of undue concentration. . . . There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical."¹⁰³

On the other hand, just because banks are involved, and because permitting certain mergers might lead to additional mergers, further concentration in already concentrated banking markets or other competitive concerns do not justify more stringent standards than those imposed by the Clayton Act. The Bank Merger Act requires banking authorities to review the impact of such transactions on competition, but in determining whether to approve a bank merger, banking authorities are not required to apply more demanding standards than those imposed under section 7 and the case law interpreting it.¹⁰⁴

103. *Philadelphia Bank*, 374 U.S. at 368-69.

104. See *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459 (9th Cir. 1973) (reversing FDIC refusal to approve merger as abuse of discretionary powers). The FDIC had "determined that although banking factors were consistent with approval and the proposed merger would not violate the antitrust laws. . . , the merger [violated the Bank Merger Act because it] would be a significant precedent for approval of additional mergers in highly concentrated markets." *Id.* at 461. "Congress specified that the antitrust laws be the sole competitive standard not only to insure uniformity, but also to afford the banking agencies a discernible body of law upon which to base their decisions." *Id.* at 464; *accord* *County Nat'l Bancorporation v. Board of Governors*, 654 F.2d 1253 (8th Cir. 1981) (refusal by Federal Reserve Board to approve merger of bank holding companies exceeded standards of Bank Holding Company Act, by considering competitive factors other than whether merger would violate antitrust laws); *Republic of Tex. Corp. v. Board of Governors*, 649 F.2d 1026, 1043 (5th Cir. 1981) (same); *Mercantile Tex. Corp. v. Board of Governors*, 638 F.2d 1255, 1261-63 (5th Cir. 1981) (same); see also *United States v. Third Nat'l Bank*, 390 U.S. 171 (1968) (Harlan, J., concurring in part, dissenting in part). "First, the District Court must decide whether the merger, considered solely from an antitrust viewpoint, would violate the Clayton Act standard embodied in the Bank Merger Act. If it would not, the inquiry is over." *Id.* at 193; *First State Bank of Clute v. Board of Governors*, 553 F.2d 950, 953 (5th Cir. 1977) (standard of review following approval by Federal Reserve Board of proposed acquisition). But see *County Nat'l Bancorporation v. Board of Governors*, 654 F.2d 1253, 1260-64 (8th Cir. 1981) (Heaney, J., dissenting) (agencies should be free to evaluate the significance of anticompetitive effects which are not technical antitrust violations, in part to determine whether merger satisfies "convenience and needs" of community); see also *infra* note 112 (discussing standard of review to be used by court following agency disapproval of merger application). See generally Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits*, 1983 DUKE L.J. 580; Metzger & Greenfield, *Agency Discretion to Deny Bank Mergers: What Are the Limits?*, 98 BANKING L.J. 838 (1981); O'Brien, *Developing of Bank Regulation and its Appropriate Competitive Standards: Grays Harbor—A Gathering Storm*, 31 BUS. LAW. 415 (1975); Note, *Washington Mutual: A Judicial Amendment to the Bank Merger Act*

Coincidentally, just as *Philadelphia Bank* is a landmark decision in the horizontal merger area, the leading Supreme Court decision delineating the appropriate analysis for evaluating the legality of geographic extension mergers also involved commercial banks. In *United States v. Marine Bancorporation*,¹⁰⁵ the Court described in detail the application of the potential competition doctrine to geographic market extension mergers. Interestingly, this doctrine, which had been used successfully in the previous Court Term to set aside another proposed merger,¹⁰⁶ has since *Marine Bancorporation* been notably unavailing in government challenges to most such transactions.¹⁰⁷

This article will not deal generally with the various theories for challenging geographic market extension mergers, and specifically the potential competition theory.¹⁰⁸ Two statements by the Court in

of 1966, 42 GEO. WASH. L. REV. 639 (1974); Note, *Antitrust-Banking-Federal Reserve Board May Not Apply Competitive Standards More Stringent Than the Antitrust Laws in Reviewing Bank Merger Applications*, 55 TEMPLE L.Q. 210 (1982).

105. 418 U.S. 602, 623-41 (1974). See generally Alcorn, *Merger Analysis for Banks and Others—Marine Bancorporation and Connecticut National Bank*, 12 HOUS. L. REV. 539 (1975); Meigher, *Bank Mergers and the Clayton Act: Some Chips in the Doctrine of Potential Competition*, 16 B.C. INDUS. & COMM. L. REV. 705 (1975); Note, *Bank Mergers and Potential Competition after Marine Bancorporation: The Role of Regulatory Entry Barriers*, 5 N.M.L. REV. 139 (1974).

106. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

107. *United States v. Virginia Nat'l Bankshares, Inc.*, 1982-2 Trade Cas. (CCH) ¶ 64,871 (W.D. Va. 1982) (merger will on balance be procompetitive).

As the Court noted in *United States v. Marine Bancorporation*, 418 U.S. 602, 627 n.30 (1974), the Government had been completely unsuccessful even prior to that decision in seeking to have bank mergers halted based on reliance on the potential competition doctrine. See *United States v. Connecticut Nat'l Bank*, 362 F. Supp. 240 (D. Conn. 1973), *vacated and remanded*, 418 U.S. 656 (1974); *United States v. United Va. Bankshares, Inc.*, 347 F. Supp. 891 (E.D. Va. 1972); *United States v. First Nat'l Bancorporation, Inc.*, 329 F. Supp. 1003 (D. Colo. 1971), *aff'd per curiam*, 410 U.S. 577 (1973); *United States v. Idaho First Nat'l Bank*, 315 F. Supp. 261 (D. Idaho 1970); *United States v. First Nat'l Bank*, 310 F. Supp. 157 (D. Md. 1970); *United States v. First Nat'l Bank*, 301 F. Supp. 1161 (S.D. Miss. 1969); *United States v. Crocker-Anglo Nat'l Bank*, 277 F. Supp. 133 (N.D. Cal. 1967) (three judge court); see also Williams, *New Dimensions to Bank Merger Law: The Supreme Court in the Mid-Seventies*, 20 ANTITRUST BULL. 699 (1975); *House Committee Examines Mergers in Banking Sector*, 46 ANTITRUST & TRADE REG. REP. (BNA) 968 (May 17, 1984) (current laws would be inadequate to protect against high levels of concentration if interstate banking prohibitions are lifted); *Economists Outline Study Results on Concentration, Bank Expansions*, 46 ANTITRUST & TRADE REG. REP. (BNA) 1010 (May 24, 1984) (questioning adequacy of Justice Dept. Merger Guidelines in dealing with bank mergers). See generally Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation*, 58 B.U.L. REV. 199 (1978).

108. See generally IV E. KINTNER, *supra* note 72, at ch. 36; O'Brien, *Legal Evolution of Potential Competition and its Application to Banking*, 30 BUS. LAW. 1181 (1975); Whitesell, *Potential Competition and Bank Mergers*, 88 BANKING L.J. 387 (1971); Willacy & Willacy, *Conglomerate Bank Mergers and Clayton 7: Is Potential Competition the Answer?*, 93 BANK.

Marine Bancorporation, however, are of particular significance to the acquisition by a bank of another bank in a different geographic area. First, bank mergers are to be tested by the same general standards of Clayton section 7 as similar transactions in other settings, and thus "geographic market extension mergers by commercial banks must pass muster under the potential-competition doctrine."¹⁰⁹ Second, state and federal regulations may affect the calculus of the transaction's probable effect on competition. A bank's ability to expand into new areas by opening branch banks or establishing a new banking enterprise is more limited than in a completely unregulated industry; thus, other steps which could enhance competition are unavailable. Therefore, the Court noted that "the application of the [potential competition] doctrine to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of commerce. Failure to do so would produce misconceptions that go to the heart of the doctrine itself."¹¹⁰

4. Defenses

The Bank Merger Act and its companion, the Bank Holding Company Act, both provide that even an acquisition which on balance reduces competition may be approved if the responsible supervising

ING L.J. 148 (1976); Note, *Bank Mergers and Potential Competition*, 43 FORDHAM L. REV. 767 (1975); cf. *United States v. First Nat'l State Bancorporation*, 499 F. Supp. 793, 816 (D.N.J. 1980) (declining to extend entrenchment doctrine to commercial banking).

109. *Marine Bancorporation*, 418 U.S. at 627; see also *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120-22 (1975), noted in Velvel, *Carving Holes in the Sherman Act: A Comment on the Citizens & Southern Case*, 25 CATH. U.L. REV. 535 (1976); Recent Decision, 10 GA. L. REV. 641 (1976); *Republic of Tex. Corp. v. Board of Governors*, 649 F.2d 1026, 1044-48 (5th Cir. 1981); *Mercantile Tex. Corp. v. Board of Governors*, 638 F.2d 1255, 1263-72 (5th Cir. 1981); *United States v. First Nat'l State Bancorporation*, 499 F. Supp. 793, 813-16 (D.N.J. 1980); *Southwest Miss. Bank v. Federal Deposit Ins. Corp.*, 499 F. Supp. 1, 14-16 (S.D. Miss. 1979), *aff'd mem.*, 625 F.2d 1013 (5th Cir. 1980). See generally Rhoades, *Impact of Foothold Acquisitions on Bank Market Structure*, 22 ANTITRUST BULL. 119 (1977); Vartanian, *Potential Competition and Bank Mergers: Defense Blueprint for the 1980's*, 99 BANKING L.J. 382 (1982).

110. 418 U.S. at 627. See generally Comment, *Potential Competition in Bank Mergers Under Section 7 of the Clayton Act*, 44 U. CIN. L. REV. 314 (1975); Comment, *Monopolies: Clayton Section 7 and the Potential Competition Doctrine—What Sort of Standards for Commercial Banks*, 27 U. FLA. L. REV. 574 (1975); Note, *State Banking Restrictions on De Novo Expansion Must Be Considered in the Determination of Whether a Market Extension Merger Between Commercial Banking Organizations is Proscribed by Federal Antitrust Legislation*, 41 BROOKLYN L. REV. 711 (1975); Note, *Antitrust Law-Banks-Legal Barriers to Market Entry Means No Elimination of Potential Competition*, 26 MERCER L. REV. 975 (1975); Case Comment, 59 MINN. L. REV. 609 (1975); Note, *Potential Competition and Bank Mergers' Recent Supreme Court Decisions*, 9 SUFFOLK U.L. REV. 1372 (1975).

agency "finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."¹¹¹ Applying this defense to specific transactions raises both procedural and substantive issues.

The Supreme Court considered a host of procedural issues in its first decision after the then-new Bank Merger Act of 1966.¹¹² The Comptroller of the Currency had approved two bank mergers, which the government challenged; in both cases the district court dismissed the government's complaint that the mergers violated section 7 of the Clayton Act.¹¹³ In reversing and remanding the actions for trial, the Supreme Court explored the Bank Merger Act's procedural effect. The court pointed out that first, a complaint is not defective for failure to allege a violation of the Bank Merger Act and for relying solely on the Clayton Act.¹¹⁴ The cause of action indeed arises under the antitrust laws, and the Bank Merger Act is significant solely as a defense. Second, since the "convenience and needs" exception in the Bank Merger Act is a defense, the burden of pleading, and the burden of proof of showing that the transaction "clearly" satisfies these needs, are on the defendant banks.¹¹⁵ Third, the review by the trial court to determine whether the defense is satisfied is to be de novo; the court need not defer to the agency decision (unlike the review of certain administrative decisions, where the agency determination is to be upheld unless it is clearly erroneous or unsupported by substantial evidence).¹¹⁶ Requiring adherence to an agency determination unless it was arbitrary or capricious would be a step towards allowing the agency to confer antitrust immunity for bank mergers—a result inconsistent with Congressional intent.¹¹⁷ Fourth,

111. 12 U.S.C. § 1828(c)(5)(B) (1982) (bank mergers); *id.* § 1842(c)(2) (bank holding company mergers). The statutes provide that the standards to be applied by a court in reviewing the agency's decision shall be identical, including consideration of any defenses, to those applied by the agency. *Id.* § 1828(c)(7)(B) (bank mergers); *id.* § 1849(b) (bank holding company mergers). See generally Alcala, *Neither Convenient nor Needed: The Convenience and Needs and Public Benefits Tests of the Bank Holding Company Act*, 96 BANKING L.J. 325 (1979); Golden, *Preparing the Convenience and Needs Defense Under the Bank Merger Act of 1966*, 96 BANKING L.J. 100 (1979); Recent Decision, 54 GEO. L.J. 686 (1966).

112. The Court decided two cases in the same opinion: *United States v. First City Nat'l Bank and United States v. Provident Nat'l Bank*, 386 U.S. 361 (1967), *noted in*, Recent Decision, 5 DUQ. L. REV. 511 (1967).

113. *First City*, 386 U.S. at 363.

114. *Id.* at 363-64.

115. *Id.* at 366; see also *United States v. Third Nat'l Bank*, 390 U.S. 171, 192 (1968).

116. 386 U.S. at 366-68.

117. *Id.* at 368. The extent of any immunity for both mergers and other anticompetitive activities as the result of agency activity again was considered in *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 102-11 (1975). In that action involving interpretation of the Bank Holding Company Act, the Court stressed that the immunity that would flow from the failure

the automatic stay provided by the statute¹¹⁸ lasts through all judicial proceedings, and does not terminate after the district court affirms agency approval, if judicial appeals are still pending.¹¹⁹

The Supreme Court considered the substantive content of the "convenience and needs" defense in a decision in the following Term, *United States v. Third National Bank in Nashville*.¹²⁰ In that case, the second and fourth largest banks in Nashville, Tennessee, had agreed to merge, forming what would have been the largest bank in the area. After the Comptroller of the Currency approved the merger, the Government challenged the transaction. The district court upheld the merger, finding that it would not substantially lessen competition and, in any event, any anticompetitive effect would be outweighed by the "convenience and needs of the community to be served."¹²¹

After first rejecting the district court's conclusion as to the lack of anticompetitive effect, the Supreme Court considered the "convenience and needs" defense.¹²² The Court recognized that "[t]he purpose of the Bank Merger Act was to permit certain bank mergers even though they tended to lessen competition in the relevant market."¹²³ The defense thus permits certain mergers notwithstanding anticompetitive effects. The Court then offered an additional test to define when these additional factors support approving an other-

of the Department of Justice to challenge an acquisition or merger within thirty days of its "approval," see 12 U.S.C. § 1849(b) (1982), applied only to "formal approval" by the Board itself, and was inapplicable to an indication of approval by the agency staff, or its equivalent, *i.e.*, the determination by the staff, after an informal review, not to bring a challenge against certain conduct. The Court also stressed that the grandfather clause in the Bank Holding Company Act, see *id.* § 1849(d), immunized all transactions undertaken prior to July 1, 1966, which had not been challenged by the Department of Justice, regardless of whether they actually violated the statute and regardless of whether the violation was of § 7 of the Clayton Act or § 1 of the Sherman Act.

The standard of judicial review following agency disapproval of a merger application—whether it should be *de novo*, as in the case of Justice Department challenges following agency approval, or deference to the agency, setting disapproval aside only if it is arbitrary or capricious—is unclear. Compare *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 464 (9th Cir. 1973) (review limited to arbitrary or capricious decisions or abuse of discretion) with *Southwest Miss. Bank v. FDIC*, 499 F. Supp. 1, 15-16 (S.D. Miss. 1979) (*de novo* review).

118. See 23 U.S.C. § 1828(c)(7)(A) (1982) (bank mergers); *id.* § 1849(b) (bank holding company mergers); see also *supra* notes 56, 67 and accompanying text.

119. 386 U.S. at 370-71.

120. 390 U.S. 171 (1968), noted in, Note, *Trade Regulation-Mergers-Bank Merger Act of 1966*, 36 TENN. L. REV. 833 (1969).

121. *Id.* at 173-76.

122. *Id.* at 181-84.

123. *Id.* at 184. "Congress felt that the role of banks in a community's economic life was such that the public interest would sometimes be served by a bank merger even though the merger lessened competition." *Id.*

wise anticompetitive merger. The Court's overarching standard was: "The *public interest* was the ultimate test imposed."¹²⁴

In applying this revised test, the Court examined the two justifications most frequently used to support the "convenience and needs" defense: the increased lending limit which the larger resultant bank would enjoy after the merger, and the rescue of the weaker acquired bank, which would otherwise be unable to provide adequate services for its customers and indeed might be in risk of financial failure.

While the Court recognized the increased lending limit as a relevant consideration, it found that a simple assertion that the lending limit would be higher was not enough to support the "convenience and needs" defense.¹²⁵ A court cannot simply presume that an increase will always have important benefits to the banks' customers and to the community at large. Rather, the acquiring bank must offer evidence of some direct *relationship* between the higher limit and a benefit to the community and must show the *value* of this particular benefit compared to the other results of the merger.¹²⁶

That the acquired bank was weak or marginally successful is also not sufficient to justify its acquisition by a larger rival, especially when the result will be just a few large banks in a concentrated market. It is true that the "convenience and needs" defense relaxes the standard from that of the "failing company doctrine" in the unregulated sectors of the economy.¹²⁷ Nonetheless, the defendant-

124. *Id.* (emphasis added). The Court noted:

It is plain that Congress considered both competition in commercial banking and satisfaction of the "convenience and needs of the community" to be in the public interest. It concluded that a merger should be judged in terms of its overall effect upon the public interest. If a merger posed a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit were to be weighed and decision was to rest on which alternative better served the public interest.

Id. at 185. This additional test could add new confusion rather than resolve the ambiguity of the statute.

125. *Id.* at 186. In *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), the Court expressly rejected this defense, finding that it had "no statutory authorization for considering such a benefit in appraising the legality of a merger. Expressions in Congress during consideration of the 1966 Act suggest that one purpose of the Act was to give this factor, . . . suitable weight in judging [bank mergers'] validity." *Third Nat'l Bank*, 390 U.S. at 186 (citing *Philadelphia Nat'l Bank*, 374 U.S. at 370-71).

126. See 390 U.S. at 186. The trial court must be "specific in describing the beneficial consequences . . . for the . . . community, or in defining the value of these additions, especially as compared with the other, and less desirable, results of the merger. Absent such findings, the increased lending capacity of the new bank weighs little in the balance." *Id.*

127. *Id.* at 187. "Congress was also concerned about banks in danger of collapse—banks not so deeply in trouble as to call forth the traditional 'failing company' defense, but nonetheless in danger of becoming before long financially unsound institutions." *Id.*

acquiring bank must at least show that the improvements in the unsuccessful bank's situation could not be achieved by less anti-competitive means, including its acquisition by a smaller bank or the introduction of new management.¹²⁸

The application of the "convenience and needs" defense was explored again in the *Phillipsburg Bank* case.¹²⁹ There, the Court's major focus was on the geographic area in which to determine whether the anticompetitive effects of the merger were outweighed by other benefits. Rejecting the district court's use of a larger geographic area to evaluate the effect on competition than to evaluate the defense, the Court held that the asserted "convenience and needs" can not be assessed only in a segment of the community where the anti-competitive effect will be felt. While the "convenience and needs" benefit may on occasion be conferred in an area *larger* than the area adversely affected, the area benefitted can never be *smaller* than the area suffering the adverse impact.¹³⁰

In light of the more serious impact of a bank failure than failure in the unregulated sector, the "convenience and needs" defense is more liberal and thus subsumes the failing company doctrine. See generally Via, *Antitrust and the Rescue of Distressed Banks by Acquisition*, 94 BANKING L.J. 508 (1977); IV E. KINTNER, *supra* note 72, §§ 34.12, 35.24, 36.20 (discussing failing company doctrine).

128. 390 U.S. at 190. "[B]efore the merger injurious to the public interest is approved, a showing [must] be made that the gain expected from the merger cannot reasonably be expected through other means." *Id.*

In *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970), the Court not only repeated these requirements, but added an additional wrinkle:

Beyond careful consideration of alternative methods of serving the convenience and needs of [the affected community], the [district] court should deal specifically with whether the proposed merger is likely to benefit all seekers of banking services in the community, rather than simply those interested in large loan and trust services.

Id. at 372; see also *Mid-Nebraska Bancshares, Inc. v. Board of Governors*, 627 F.2d 266, 271-72 (D.C. Cir. 1980) (rejecting defense).

129. 399 U.S. at 369-73.

130. *Id.* at 371-72. The Court stated:

[T]he geographic market—the "community which that particular sought-to-be merged bank services"—is the area in which convenience and needs must be evaluated. Commercial realities, moreover, make clear that the "community to be served" is virtually always as large, or larger, than the geographic market. . . . [T]he clear congressional purpose in the Bank Merger Act [was] that convenience and needs not be assessed in only a part of the community to be served; . . . such a result would unfairly deny the benefits of the merger to some of those who sustain its direct and immediate anticompetitive effects.

Id.; see also *United States v. First Nat'l State Bancorporation*, 499 F. Supp. 793, 816-17 (D.N.J. 1980) (defendant's burden of proving defense unsatisfied).

C. *Supervision of Mergers by Other Banking Institutions*

There has been considerably less concern about the competitive implications of mergers involving "thrift institutions" than those of commercial banks. Because thrift institutions tend to be smaller, and because they are generally subject to greater competition from other kinds of banks, such mergers or acquisitions are usually less likely to adversely affect competition.¹³¹

1. Savings and Loan Associations and Mutual Savings Banks

The assignment of responsibility for regulating proposed mergers of savings and loan associations and mutual savings banks¹³² depends on whether the institution is a separate institution or is part of (or will become part of) a holding company. If the proposed transaction involves two savings and loan associations, supervisory responsibility is conferred on the Federal Home Loan Bank Board;¹³³ if the transaction involves a thrift institution holding company, responsibility falls on the Board's subordinate agency, the Federal Savings and Loan Insurance Corporation.¹³⁴

The Federal Home Loan Bank Board's authority to regulate acquisitions and mergers by independent savings and loan associations is conferred by statute.¹³⁵ Unlike the Bank Merger Act or the Bank Holding Company Act,¹³⁶ the statutory provision covering these thrift institutions contains no standards for the Board to apply in deciding whether to approve a transaction. Instead, the Board has promulgated a policy statement, articulating the factors it will consider;¹³⁷ these factors are similar to the criteria courts have applied in evaluating commercial bank acquisitions.¹³⁸

The standards regarding mergers or acquisitions by savings and

131. See *United States v. Chelsea Sav. Bank*, 300 F. Supp. 721 (D. Conn. 1969) (Clayton Act § 7 also applies to mergers by non-stock mutual savings banks).

132. The Home Owners' Loan Act, 12 U.S.C. §§ 1461-1470 (1982), provides that "[t]he term 'association' means a Federal savings and loan association or a Federal mutual savings bank . . . , and any reference in any other law to a Federal savings and loan association shall be deemed to be also a reference to a Federal mutual savings bank, unless the context indicates otherwise." *Id.* § 1462(d). All references in this portion of this article to savings and loan associations will therefore include treatment of mutual savings bank.

133. *Id.* § 1464(d)(11).

134. *Id.* § 1730a(e).

135. The statute provides that "[t]he Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, [and] for the merger of associations with other institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation." *Id.* § 1464(d)(11).

136. See *supra* notes 33-69 and accompanying text.

137. 12 C.F.R. § 571.5 (1986).

138. The Board's statement follows:

In determining whether a violation of the antitrust laws is likely, the Board will ex-

loan holding companies are specified by the National Housing Act, as amended.¹³⁹ The Act confers authority to supervise mergers and acquisitions of a "savings and loan holding company"¹⁴⁰ on the Federal Savings and Loan Insurance Corporation.¹⁴¹ Upon application for approval of such a transaction, the Corporation is required to obtain a report from the Attorney General on the competitive factors the transaction implicates.¹⁴² These factors are identical to those applicable to commercial bank mergers—a determination of the anticompetitive effects of the proposed transaction, with the possibility that they will be "clearly outweighed in the public interest by the probable effect of the acquisition in meeting the convenience and needs of the community to be served."¹⁴³

2. Credit Unions

Regulation of mergers by credit unions is similar to that of independent savings and loan associations;¹⁴⁴ the statute itself contains

amine all of the relevant facts, including: (i) competition currently existing in the relevant markets . . . ; (ii) market shares and the reliability thereof, . . . ; (iii) the ranking of the resulting institution and of other competing institutions in the relevant markets; (iv) the number and size distribution of competitors; (v) trends in the market toward concentration or deconcentration; and (vi) the history and pattern of expansion and growth in the market, including the existence of potential entrants and future procompetitive trends. . . . The Board will also examine the extent to which the transaction will affect the convenience and needs of the communities to be served and the impact, if any, on operating efficiency of the resulting or purchasing institution.

Id. § 571.5(b)(3)-(4). See generally Brumbaugh, *The Antitrust Merger Criteria for Federally Insured Savings and Loan Associations*, 16 FED. HOME LOAN BANK BOARD J. 12 (1983); Leibold, *Mergers of FSLIC Insured Savings and Loan Associations*, 37 BUS. LAW. 868 (1982); Tucker, *Savings and Loan Association Mergers*, 43 CONN. B.J. 394 (1969); Yurchuck, *Pre-Merger Legal Analysis*, 26 BUS. LAW. 383 (1970).

139. 12 U.S.C. § 1701-1750g (1982).

140. A "savings and loan holding company" is defined as "any company which directly or indirectly controls an insured institution or controls any other company which is a savings and loan holding company" *Id.* § 1730a(a)(1)(D).

141. *Id.* § 1730a(e)(1). These provisions of the National Housing Act apply as well to the acquisition of only a single savings and loan association, (rather than to the acquisition of "more than one insured institution," despite the use of that latter phrase in § 1730a(e)(2)) and to the acquisition of such a thrift institution by a holding company formerly controlling only a commercial bank. *Fort Worth Nat'l Corp. v. Federal Sav. & Loan Ins. Corp.*, 469 F.2d 47, 56-57 (5th Cir. 1972).

142. 12 U.S.C. § 1730a(e)(2) (1982).

143. *Id.* § 1730a(e)(2)(B); cf. *id.* § 1828(c)(5)(B) (bank mergers); *id.* § 1842(c)(2) (bank holding company mergers). The legislative history makes clear this intent to duplicate the standards of these other statutes. See H.R. REP. NO. 997, 90th Cong., 1st Sess. 12 (1967) (quoted in *Fort Wayne Nat'l Bank*, 469 F.2d at 56. See generally Roster, *Acquisitions of Savings and Loan Associations by Holding Companies*, 36 BUS. LAW. 875 (1982).

144. See *supra* notes 135-43 and accompanying text.

no stated criteria; instead, authority is granted to the appropriate regulatory body—in this case, the National Credit Union Administration—to promulgate rules governing these transactions.¹⁴⁵ The Administration has in fact promulgated such regulations;¹⁴⁶ however, unlike those of the Federal Home Loan Bank Board,¹⁴⁷ the NCUA regulations make no mention of the antitrust laws or of competitive concerns. In fact, research reveals no instance in which approval for a proposed merger of credit unions was withheld because of antitrust concerns.

IV. INTERLOCKING DIRECTORATES

An interlocking directorship¹⁴⁸—the presence of the same person on the board of directors of two corporations—may indirectly advance or even effect the same anticompetitive results which would be undesirable or illegal if achieved by a direct agreement between the two corporations themselves. Because of the critical importance of the banking industry to competition—both among banking institutions themselves, and because the lending ability of banks is often necessary for competition by industrial concerns—interlocking directorates by banking officials can have particularly acute implications.

Two statutes exist which limit interlocking directorates in the banking industry—section 8 of the Clayton Act¹⁴⁹ and the Depository Institution Management Interlocks Act of 1978 (Interlocks Act).¹⁵⁰ Although in one respect section 8 has a slightly broader reach than the Interlocks Act,¹⁵¹ as a practical matter the 1978 statute has effectively supplanted the Clayton Act as the regulator of interlocking bank directorates.¹⁵²

145. 12 U.S.C. § 1766(a) (1982).

146. 12 C.F.R. § 708 (1986).

147. *Cf. supra* notes 137-38 and accompanying text.

148. *See generally* IV E. KINTNER, *supra* note 72, at ch. 42 (discussing interlocking directorates); Tavers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEX. L. REV. 819 (1968); sources cited *infra* note 14.

149. 15 U.S.C. § 19 (1982).

150. Pub. L. No. 95-630, 92 Stat. 3672-3675 (codified at 12 U.S.C. §§ 3201-3207 (1982)). The Act was amended in 1982 by the Garn-St Germain Depository Institutions Act, Pub. L. No. 97-320, 96 Stat. 1524 (codified at 12 U.S.C. § 3208 (Supp. III (1986))). This amendment expended the enforcement powers of the Department of Justice. *See infra* note 172 and accompanying text.

151. *See infra* note 162 and accompanying text.

152. *See* 12 C.F.R. § 212.7 (1986) ("The Board of Governors of the Federal Reserve System regards the provisions of the first three paragraphs of section 8 of the Clayton Act (15 U.S.C. § 19) to have been supplanted by the revised and more comprehensive prohibitions on management official interlocks between depository organizations in the Interlock Act.").

A. *Clayton Act Section 8*

The principal provision of section 8 of the Clayton Act makes it unlawful for any private banker¹⁵³ or any director, officer, or employee of any member bank of the Federal Reserve System to be simultaneously a director, officer or employee of any national or state bank, banking association, savings bank, or trust company. While this provision reaches many kinds of interlocking directorates, it is underinclusive in a number of ways. First, it is limited to directorships in certain kinds of financial or banking institutions.¹⁵⁴ Second, the statute itself contains a number of exceptions, including a significant geographical limitation, making the statute's prohibitions inapplicable unless the two institutions are located (or have a branch in) the same (or a contiguous or adjacent) city, town or village.¹⁵⁵ Third, the Supreme Court recently held, in *Bankamerica Corp. v. United States*,¹⁵⁶ that section 8 is inapplicable to a directorship held by an officer or director of a bank in a competing, but nonbanking, corporation.¹⁵⁷ Therefore, the 1978 Act principally regulates interlocking bank directorates.

153. The now-repealed Federal Reserve Board Regulations to § 8 had defined a "private banker" as "an unincorporated individual engaged in the banking business or a member of an unincorporated firm engaged in such business." *Id.* § 212.1(b) n.2 (1979).

154. The prohibition is underinclusive in two ways. First, it applies only to a "director, officer, or employee of any member bank of the Federal Reserve System," 15 U.S.C. § 19 (1982). As noted above, see *supra* notes 14-18 and accompanying text, this includes national banks and "state member banks," but excludes "state nonmember insured banks" and "state nonmember uninsured banks." Second, such a person is precluded from holding a directorship only in "any other bank, banking association, savings bank, or trust company." 15 U.S.C. § 19. As the now-repealed Federal Reserve Board regulations observed, this makes the prohibition inapplicable to directorships in savings and loan associations or credit unions, and also in Joint Stock Land banks, Federal Land banks, Federal Reserve banks, Federal Intermediate Credit banks, The Central Bank for Cooperatives, Federal Home Loan banks, foreign banks, or banks organized under the laws of American territories such as Puerto Rico. 12 C.F.R. § 212.1(b) n.3 (1986).

155. 15 U.S.C. § 19(5) (1982). Section 8 is also inapplicable if at least 90% of the stock of the "second" bank is owned by the United States, *id.* § 19(1); if the "second" bank is in receivership or is being liquidated, *id.* § 19(2); if the stock of the member bank and the "second" bank are at least 50% owned by the same person, *id.* § 19(4); if the member bank and the "second" bank are not in competition (*i.e.*, they are "not engaged in [the same] class or classes of business"), *id.* § 19(6); or if the "second" bank is a nonstock mutual savings bank, *id.* § 19(7).

156. 462 U.S. 122 (1983), *noted in*, Comment, *Antitrust Law-Clayton Act-Interlocking Bank/Non-Bank Directorates-Statutory Interpretation*-Bankamerica Corp. v. United States, 30 N.Y.L. SCH. L. REV. 777 (1985).

157. 462 U.S. at 130-31. In the *Bankamerica* case, the Government challenged the service by five individuals—each of whom served on the board of directors of a bank or bank holding company—on the board of an insurance company at the same time. The parties stipulated that

B. *Depository Institution Management Interlocks Act of 1978*

In the late 1970s, the perception arose that existing legislation dealing with interlocking bank directorates was inadequate and outdated.¹⁵⁸ Therefore, Title II of the Financial Institutions Regulatory and Interest Rate Control Act of 1978¹⁵⁹ more extensively limited these interlocks. Title II, which is referred to as the Depository Institution Management Interlocks Act,¹⁶⁰ made two major changes beyond the existing legislation. It extended the prohibitions to most kinds of financial institutions, and it expanded the geographic reach of the prohibitions when particularly large financial institutions are involved.

Unlike section 8 of the Clayton Act, which restricts employees, officers and directors only of Federal Reserve Board member banks,¹⁶¹ the Interlocks Act prohibits certain interlocking directorates by a "management official"¹⁶² of any type of "depository institution or a

the interlocked banks and insurance companies competed in the market for mortgage and real estate loans. *Id.* at 124.

Paragraph 4 of § 8 of the Clayton Act provides that "[n]o person at the same time shall be a director in any two or more corporations . . . other than banks, banking associations [and] trust companies." At issue was whether this language should be read to prohibit such interlocks involving "two or more corporations [none of which are] banks," or "two or more corporations [not all of which are] banks." *Id.* at 125.

In a 5-3 decision, the opinion of which was written by Chief Justice Burger, the Court opted for the former reading, thus finding the Clayton Act inapplicable to bank-nonbank interlocks. Support for that conclusion was found (1) by giving the language of the statute its "most natural reading," *id.* at 128; (2) after noting that the Government had not brought a previous action asserting this interpretation of § 8 in the over 60 years since the Clayton Act was enacted in 1914, and noting the apparent acquiescence by the Congress in this interpretation, *id.* at 130-32; and (3) by examining the legislative history of the Clayton Act, evidencing the view by many members of Congress that banks were to be treated only by the first three paragraphs of § 8, and that the fourth paragraph was to apply only to industrial organizations, *id.* at 133-39. See generally Comment, *The Need for Antitrust Legislation Tailored to the Specific Concerns of Bank-Nonbank Director Interlocks*, 1982 DUKE L.J. 938; Comment, *Interlocks in Management Between Savings and Loan Associations and Commercial Banks Under the Antitrust Laws and the FTC Act*, 65 GEO. L.J. 1263 (1977); Note, *Interlocking Directorates Among Banks and Nonbanking Institutions*, 9 J. LEGIS. 332 (1982); Note, *Interlocking Directorates Under the Clayton Act: A Realistic Look at the Nature of Banking and Insurance Today*, 3 W. ST. U.L. REV. 284 (1976); cf. *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974) (Section 8 applicable to ownership by trust company of blocks of stock in two competing industrial corporations, and then placing its employees on boards of directors of those competitors).

158. H.R. REP. NO. 1383, 95th Cong., 2d Sess. 14-15, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9273, 9286-87.

159. Pub. L. No. 95-630, 92 Stat. 3641 (codified as amended in scattered sections of 12 U.S.C.).

160. Pub. L. No. 95-630, 92 Stat. 3641, 3672 (codified at 12 U.S.C. §§ 3201-3207 (1982)).

161. See *supra* note 154 and accompanying text.

162. 12 U.S.C. § 3201(4) (1982). "[T]he term 'management official' means an employee or of-

depository holding company.”¹⁶³ As a result, the prohibition extends not only to directors of all kinds of commercial banks, but also to directors of savings banks, trust companies, savings and loan associations, building and loan associations, cooperative banks and credit unions.¹⁶⁴

The geographic extent of the prohibition on interlocking directorates is graduated, depending on the size of the depository institution. First, no person may serve simultaneously as a management official of two such institutions—regardless of their size—the offices of which are located in the same, contiguous or adjacent city, town, or village or in contiguous or adjacent cities, towns, or villages.¹⁶⁵ Second, if the depository institutions have assets of more than \$20 million, the prohibition is broadened to bar simultaneous directorships of institutions with offices in the same standard metropolitan statistical area.¹⁶⁶ Finally, no person who is a management official of a depository institution that has assets exceeding \$1 billion may serve at the same time as a management official of another such institution having assets over \$500 million anywhere in the country.¹⁶⁷

Enforcement of the Interlocks Act falls on the five separate agencies¹⁶⁸ with responsibility for supervising the different kinds of financial institutions;¹⁶⁹ these agencies are also authorized to promulgate rules and regulations exempting an otherwise unlawful directorate if,

ficer with management functions, a director (including an advisory or honorary director), a trustee of a business organization under the control of trustees, or any person who has a representative or nominee serving in any such capacity. . . .” *Id.* To this extent, Clayton Act § 8 may be slightly broader, since its prohibitions extend to simultaneous service as a director, officer or employee, without regard to management status, of a member bank and a “second” bank.

163. *Id.* § 3205. The statute provided for a phase-in period, allowing persons whose directorship positions were only made unlawful for the first time by the Act a period of ten years before that relationship had to be terminated. *Id.*

164. *Id.* § 3201(1)-(2).

165. *Id.* § 3202(2).

166. *Id.* § 3202(1). This provision was amended in 1983 to substitute the terms “primary metropolitan statistical area, the same metropolitan statistical area, or the same consolidated metropolitan statistical area that is not comprised of designated primary metropolitan statistical areas” for the former term “standard metropolitan statistical area.” Pub. L. No. 98-181, 97 Stat. 1153, 1267 (codified at 12 U.S.C. § 3202(1) (Supp. III (1986))).

167. 12 U.S.C. § 3203 (1982). As with Clayton Act § 8, *cf. supra* note 154, the Interlocks Act contains a number of exceptions. For example, the prohibitions are inapplicable to depository institutions in liquidation or receivership, 12 U.S.C. § 3204(1); to foreign banking institutions, *id.* § 3204(4); to state-chartered savings and loan guaranty corporations, *id.* § 3204(5); or to Federal Home Loan Banks, *id.* § 3204(6).

168. *See supra* notes 11-29 and accompanying text.

169. 12 U.S.C. § 3206 (1982).

on balance, the relationship would promote competition.¹⁷⁰ The Interlocks Act also provided for the agencies to refer potential violations to the Attorney General for enforcement.¹⁷¹ In 1982, the Act was amended to allow the Attorney General—or the Assistant Attorney General in charge of the Antitrust Division—to commence enforcement proceedings on his own initiative, without first awaiting agency referral.¹⁷²

V. CONDITIONAL TRANSACTIONS

The general antitrust laws—specifically section 1 of the Sherman Act,¹⁷³ section 3 of the Clayton Act,¹⁷⁴ and section 5 of the Federal Trade Commission Act¹⁷⁵—contain provisions making certain conditional transactions unlawful.¹⁷⁶ These laws prohibit tying arrangements, exclusive dealing arrangements, and reciprocal dealing arrangements in a variety of situations, and the victims of such restraints may sue for injunctive or treble damage relief.

These general provisions may be inadequate to deal with such conditional transactions by banking institutions. First, certain statutory elements of a violation of section 3 of the Clayton Act are absent in almost all banking institution restrictions;¹⁷⁷ thus, plaintiffs must rely solely on the other two statutory prohibitions.¹⁷⁸ Second, recent

170. *Id.* § 3207. The regulations promulgated by the Federal Reserve Board appear at 12 C.F.R. § 212 (1986).

171. 12 U.S.C. § 3206(6) (1982).

172. *Id.* § 3208. This amendment was part of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, (codified at 12 U.S.C. § 3208 (Supp. III (1986))).

173. 15 U.S.C. § 1 (1982).

174. *Id.* § 14.

175. *Id.* § 45.

176. A number of articles have addressed various aspects of this topic. *See, e.g.,* Edwards, *Economics of 'Tying' Arrangements: Some Proposed Guidelines for Bank Holding Company Regulation*, 6 ANTITRUST L. & ECON. REV. 87 (1973); Edwards, *Tie-In Sales in Banking and One Bank Holding Companies*, 14 ANTITRUST BULL. 587 (1969); Klebaner, *Credit Tie-ins: Where Banks Stand After the Fortner Decision*, 95 BANKING L. J. 419 (1978); Leonard, *Unfair Competition Under Section 106 of the Bank Holding Company Act: An Economic and Legal Overview of "Conditional Transactions,"* 94 BANKING L.J. 773 (1977); Naegele, *The Anti-tying Provision: Its Potential Is Still There*, 100 BANKING L.J. 138 (1983); Note, *Section 1972: Augmenting the Available Remedies for Plaintiffs Injured by Anticompetitive Bank Conduct*, 60 NOTRE DAME L. REV. 706 (1985); *see also* Annotation, *What Constitutes Violation of Provisions of Bank Holding Company Act Prohibiting Tying Arrangements*, 74 A.L.R. Fed. 578 (1985).

177. Section 3 applies only to a contract for the "sale or lease" of "goods . . . or other commodities." 15 U.S.C. § 14 (1982). A loan of money or extension of credit would not fall within this statutory language.

178. Section 1 of the Sherman Act, which prohibits contracts "in restraint of trade," does not impose the jurisdictional requirements of Clayton § 3, but requires at least as much show-

case law, which imposes higher requirements on a Sherman or Clayton Act plaintiff, makes success under the general antitrust laws far more difficult.¹⁷⁹ Third, the particular nature of the banking industry makes it more important to prohibit such transactions here than in other less sensitive or important segments of the economy.¹⁸⁰

In light of these limitations of the general antitrust laws, Congress has on two occasions passed specific legislation to deal with conditional transactions by members of the banking industry—section 106 of the Bank Holding Company Act of 1970¹⁸¹ and section 331 of the Garn-St Germain Depository Institutions Act of 1982.¹⁸² The 1970 Act, which was aimed at commercial banks and bank holding companies, “prohibit[s] anticompetitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire;”¹⁸³ the Act also provides an exemption for reasonable or traditional banking practices.¹⁸⁴ The 1982 Act

ing of the substantive elements of a Clayton Act violation, if not more. *Id.* § 1. Section 5 of the FTC Act, while imposing lower threshold requirements because of its quality as an incipency statute, can only be enforced by the Federal Trade Commission. *Id.* § 45.

This is not to say, however, that these statutory provisions could not be used to challenge conditional transactions by banks. Two of the leading Sherman Act tying arrangement cases involved the extension of credit by a nonbank lending institution on the condition that the borrower purchase certain goods sold by an affiliate of the lender. *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977) (Fortner II); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495 (1969) (Fortner I).

179. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Fortner Enters.*, 429 U.S. 610 (Fortner II).

180. See generally *Parsons Steel, Inc. v. First Ala. Bank*, 679 F.2d 242, 244-45 (11th Cir. 1982); Note, *Section 1972, supra* note 173, at 707-15 (describing policy considerations unique to bank industry conditional transactions).

181. Pub. L. No. 91-607, 84 Stat. 1760, 1766-68 (codified at 12 U.S.C. §§ 1971-1978 (1982)).

182. Pub. L. No. 97-320, 96 Stat. 1469, 1503-04 (codified at 12 U.S.C. § 1464(q) (Supp. III (1986))).

183. S. REP. NO. 1084, 91st Cong., 2d Sess. 17, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5535.

184. The key prohibition of the 1970 Act is as follows:

- (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—
 - (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
 - (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
 - (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

extends these same proscriptions to federally chartered savings and loan associations and federally chartered savings banks. Employing similar language, both statutory provisions not only make such conditional transactions unlawful, but also allow injunctive relief¹⁸⁵ or treble damage relief¹⁸⁶ for injured parties.¹⁸⁷

Three broad issues have arisen in connection with these provisions: (1) whether the conduct is the type of conditional transaction encompassed within the statutory language; (2) whether the conduct falls within the statutory exemptions for traditional or reasonable banking practices; and (3) whether the plaintiff has standing to bring an action.

A. *Conduct Prohibited By Statutes*

The statutes make it unlawful for a bank to impose a variety of credit or deposit requirements on a customer as a condition of the initial transaction.¹⁸⁸ The statutes reach all three types of "conditional requirements:" tying arrangements,¹⁸⁹ exclusive dealing re-

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purpose of this chapter.

12 U.S.C. § 1972(1)(A)-(E) (1982).

185. 12 U.S.C. §§ 1976, 1464(q)(2) (Supp. III (1986)).

186. *Id.* §§ 1975, 1464(q)(3); see also *Hometown Builders, Inc. v. Atlantic Nat'l Bank*, 477 F. Supp. 717, 719-20 (E.D. Va. 1979) (in light of availability of treble damages, punitive damages unavailable).

187. The 1970 Act also contains an express provision allowing for enforcement of its proscriptions by the Attorney General. 12 U.S.C. § 1973 (1982). As one commentator has noted, however, the Government does not seem to have brought an action under this statute. Naegele, *The Anti-tying Provision: Its Potential Is Still There*, 100 *BANKING L.J.* 138, 144 (1983).

188. 12 U.S.C. § 1972(1) (1982). The statute applies, *inter alia*, to conditions imposed by a bank when it "extend[s] credit." *Id.* This term has been given a broad interpretation. See, e.g., *Parsons Steel, Inc. v. First Ala. Bank*, 679 F.2d 242, 244 (11th Cir. 1982) (refinancing loan was "extension of credit"); *Swerdlow v. Miami Nat'l Bank*, 584 F.2d 54, 59 (5th Cir. 1978) (forebearance on collection of loan), *rev'g*, 408 F. Supp. 940 (S.D. Fla. 1976); *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 555 (S.D.N.Y. 1985) (same); *Freidco, Ltd. v. Farmers Bank*, 499 F. Supp. 995, 1001 (D. Del. 1980) (deferral of payment on past due obligations). But cf. *Peterson v. Wells Fargo Bank*, 556 F. Supp. 1100, 1107-08 (N.D. Cal. 1981) (increase in amount of interest or finance charge is integral part of loan term rather than additional requirement; no tie-in exists).

189. See 12 U.S.C. § 1972(1)(A)-(B) (1982).

quirements,¹⁹⁰ and reciprocal dealing arrangements.¹⁹¹ Not surprisingly, the majority of successfully litigated cases have been of the tie-in variety. One bank violated the statute when it required an individual borrower, a major stockholder in a corporation, to have that corporation sell to the bank a substantial share of its retail commercial paper as a condition of obtaining a personal loan.¹⁹² Similarly, a bank's decision no longer to honor a financing arrangement with a corporation unless fifty-one percent of the corporation's stock was transferred to another bank customer was also held unlawful.¹⁹³

One significant substantive difference between the specialized bank anti-tying provisions and the general tying proscriptions of the antitrust laws is the absence under the special laws of a requirement of proof of competitive injury. The Supreme Court has recently imposed increased requirements under section 1 of the Sherman Act that the plaintiff show that the defendant has market power in the tying product and that there is a likelihood that competition in the tied product market will be substantially impaired.¹⁹⁴ On the other hand, a violation of section 106 of the 1970 Bank Holding Act, or section 331 of the Garn-St Germain Act, can be made out merely by proving the bare existence of the described conditional transaction.¹⁹⁵

In a substantial majority of the decisions, however, the courts have held the challenged conduct to be *outside* the statutes. As is often true, the scope of the conduct which falls *within* the statutory

190. See *id.* § 1972(1)(E).

191. See *id.* § 1972(1)(C)-(D). An instance of this type of restraint arose in *Freidco Del., Ltd. v. Farmers Bank*, where the plaintiff, a borrower from defendant bank, complained that the defendant had used its market power to coerce plaintiff to assign rental payments on certain real estate to the defendant on terms unfavorable to plaintiff. 499 F. Supp. at 1001.

192. *Costner v. Blount Nat'l Bank*, 578 F.2d 1192 (6th Cir. 1978); see also *Nordic Bank PLC*, 619 F. Supp. at 557 (borrower forced to guarantee debts owed by two other corporations to defendant bank).

193. *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 59 (5th Cir. 1978), *rev'g*, 408 F. Supp. 940 (S.D. Fla. 1976); see also *Sterling Coal Co. v. United Am. Bank*, 470 F. Supp. 964, 965 (E.D. Tenn. 1979) (cause of action stated by allegations that defendant bank required borrower to utilize bank's legal counsel, that it required plaintiff to enter into an exclusive sales agreement with specific company, and that it prohibited plaintiff from utilizing bank services of bank's competitors).

194. See *supra* note 179.

195. *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 443 (5th Cir.) (dictum), *cert. denied*, 106 S. Ct. 2279 (1986); *Parsons Steel, Inc. v. First Ala. Bank*, 679 F.2d 242, 245 (11th Cir. 1982); *Costner*, 578 F.2d at 1196. *But cf.* *McGee v. First Fed. Sav. & Loan Ass'n*, 761 F.2d 647 (11th Cir.) (insistence that appraisal required for real estate loan be performed by subsidiary of lender; no tie-in existed, since there is no separate market or demand for appraisal; only one product—the loan—was involved), *cert. denied*, 106 S. Ct. 273 (1985).

proscription may best be gleaned by considering cases rejecting its application. It has been held that it is not unlawful for a bank to insist that the borrower employ or retain as a consultant a certain individual;¹⁹⁶ that the borrower discharge a particular individual to make a specified change in management;¹⁹⁷ that the borrower deposit money in accounts with the lender bank;¹⁹⁸ that the borrower subject its business to the bank's supervision or control;¹⁹⁹ or that the corporate borrower assume the personal liability of its two sole stockholders and pay the interest on one stockholder's personal loans.²⁰⁰

B. Exemptions From Liability

The reach of the statutes is limited by both explicit and implicit statutory restrictions. The lack of success by the majority of plaintiffs asserting actions under these bank anti-tying provisions is a product of several factors. The statutes themselves contain several exemptions, which allow a bank to insist that the borrower employ certain "traditional services" of the bank;²⁰¹ to require that borrowers agree to conditional transactions when such a restriction is usual and

196. *Parsons Steel*, 679 F.2d at 246. *B.C. Recreational Indus. v. First Nat'l Bank*, 639 F.2d 828, 832-33 (1st cir. 1981).

197. *Parsons Steel*, 679 F.2d at 244; *Tose v. First Pa. Bank*, 648 F.2d 879, 897 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).

198. *Clark v. United Bank*, 480 F.2d 235, 238 (10th Cir.), *cert. denied*, 414 U.S. 1004 (1973); *Nesglo, Inc. v. Chase Manhattan Bank*, 506 F. Supp. 254, 260-65 (D.P.R. 1980); *Freidco, Ltd. v. Farmers Bank*, 499 F. Supp. 995, 1001-03 (D. Del. 1980).

199. *Pappas v. NCNB Nat'l Bank*, 653 F. Supp. 699, 705 (M.D.N.C. 1987); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 595 F. Supp. 800, 802-03 (E.D. Pa. 1984) (performance of audit of borrower's financial situation); *Sterling Coal Co. v. United Am. Bank*, 470 F. Supp. 964, 965 (E.D. Tenn. 1979).

200. *Sterling Coal Co.*, 470 F. Supp. at 965; *see also* *Exchange Nat'l Bank v. Daniels*, 768 F.2d 140, 143-44 (7th Cir. 1985) (not unlawful to condition grant of one loan on grant of another separate loan); *Duryea v. Third Northwestern Nat'l Bank*, 606 F.2d 823, 826 (8th Cir. 1979) (no violation where bank imposed no conditions or requirements upon plaintiff); *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 556-57 (S.D.N.Y. 1985) (several examples of conduct not within statute); *Dannhausen v. First Nat'l Bank*, 538 F. Supp. 551, 563-64 (E.D. Wis. 1982) (no violation to require borrower to assume debts of related business); *Shulman v. Continental Bank*, 513 F. Supp. 979, 984 (E.D. Pa. 1981) (no violation to condition loan on requirement that principal shareholders also make loan to borrower); *Continental Bank v. Barclay Riding Academy, Inc.*, 193 N.J. 153, 459 A.2d 1163, 1167-71 (no violation to condition loan of additional funds on grant of mortgage to lending bank by major stockholder of borrower of his interest in another corporation), *cert. denied*, 464 U.S. 994 (1983). *See generally* *Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984).

201. 12 U.S.C. § 1972(1)(A) (1982). The statute prohibits a bank from extending credit, leasing or selling property, or furnishing a service, on the condition "that the customer shall obtain some additional credit, property, or service from such bank *other than a loan, discount, deposit, or trust service.*" *Id.* (emphasis added).

customary in the industry in connection with such loan transactions;²⁰² or when the restriction is necessary to allow the bank to protect the soundness of its credit or of the loan in question.²⁰³ Furthermore, it has been held that the defendant bank must benefit from the conditions being imposed, because the statute bases the illegality on the lender's requirement that the conditional property or service be obtained from, or furnished to, the lending bank.²⁰⁴ In addition, courts have inferred a congressional unwillingness to interfere with reasonable practices of bankers, which are deemed necessary to protect the banks' investments, the financial soundness of their institution, or the interests of the banks' other depositors.²⁰⁵

C. Standing

The statutes provide that an action for damages may be brought by "[a]ny person who is injured in his business or property by reason of" a violation of the statutes' substantive prohibitions.²⁰⁶ Since this provision, which uses virtually identical language to the basic treble damage provision in section 4 of the Clayton Act,²⁰⁷ has been given different interpretations by the courts, it is difficult to make generalizations about the standing requirement for bank tie-ins.

Some courts have interpreted the standing requirement similarly to

202. *Id.* § 1972(1)(C). The statute prohibits a bank from insisting that its customers "provide some additional credit, property, or service to such bank, *other than those related to and usually provided in connection with a loan, discount, deposit, or trust service.*" *Id.* (emphasis added).

203. *Id.* § 1972(1)(E). The statute prohibits a bank from insisting that a customer not obtain credit or services from a competitor of that bank, "other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit." *Id.*

204. *Parsons Steel, Inc. v. First Ala. Bank*, 679 F.2d 242, 246 (11th Cir. 1982); *Pappas v. N.C.N.B. Nat'l Bank*, 653 F. Supp. 699, 706 (M.D.N.C. 1987). *But see Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 59 (5th Cir. 1978) (benefit to bank can be inferred from requirement that borrower had to sell its stock to designated customer of bank), *rev'g*, 408 F. Supp. 940 (S.D. Fla. 1976).

205. *Parsons Steel*, 679 F.2d at 245; *Tose v. First Pa. Bank*, 648 F.2d 879, 897-98 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); *B.C. Recreational Indus. v. First Nat'l Bank*, 639 F.2d 828, 831-32 (1st Cir. 1981); *McCoy v. Franklin Sav. Ass'n*, 636 F.2d 172, 175 (7th Cir. 1980); *Clark v. United Bank*, 480 F.2d 235, 238 (10th Cir.), *cert. denied*, 414 U.S. 1004 (1973); *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 556-57 (S.D.N.Y. 1985); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 595 F. Supp. 800, 802-03 (E.D. Pa. 1984); *Nesglo, Inc. v. Chase Manhattan Bank*, 506 F. Supp. 254, 260-65 (D.P.R. 1980); *Freidco, Ltd. v. Farmers Bank*, 499 F. Supp. 995, 1002-03 (D. Del. 1980); *Sterling Coal Co., Inc. v. United Am. Bank*, 470 F. Supp. 964, 965 (E.D. Tenn. 1979); *Continental Bank v. Barclay Riding Academy, Inc.*, 93 N.J. 153, 459 A.2d 1163, 1167-71, *cert. denied*, 464 U.S. 994 (1983).

206. 12 U.S.C. § 1975 (1982).

207. 15 U.S.C. § 15(a) (1982).

that of Clayton Act section 4, requiring that the injury be direct and immediate.²⁰⁸ Other courts have found a congressional intent to afford a more expansive remedy than the basic antitrust prohibition on tying arrangements, and thus have allowed actions by less directly injured plaintiffs.²⁰⁹ On one hand, therefore, it has been held that the individual shareholders of a privately-held corporate borrower, who gave their personal guarantees to repay the bank's loan, were "customers" of the bank and thus had standing to complain of unlawful conditions imposed by the bank in connection with the loan.²¹⁰ On the other hand, another court refused to allow standing by individual shareholders of a corporate borrower, who were required as a condition of a loan to provide loan funds as junior participants. The court held that they could not assert their own claim for injury as a result of the alleged statutory violation.²¹¹

In brief, the statutory provisions prohibiting certain conditional transactions by banks reflect a congressional concern that banks should be kept from using their economic muscle to coerce customers. On the other hand, both the statutory exemptions and the cautious treatment by some courts reflect a desire not to interfere with banking practices that protect the banks' depositors or investors. Therefore, while the statutes are more expansive than the general antitrust laws, since they do not require actual proof of anti-competitive effect, they have not become the active force for restraining certain banking practices which some litigants or legislators might desire.

208. See, e.g., *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442-43 (5th Cir.), *reh'g denied en banc*, 784 F.2d 1113, *cert. denied*, 106 S. Ct. 2279 (1986).

209. See, e.g., *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 58-60 (5th Cir. 1978), *rev'g*, 408 F. Supp. 940 (S.D. Fla. 1976); *Continental Ill. Nat'l Bank & Trust Co. v. Stanley*, 585 F. Supp. 1385, 1387-88 (N.D. Ill. 1984) (no standing under Sherman Act; standing existed under Bank Holding Company Act).

210. *Swerdloff*, 584 F.2d at 59; *Continental Ill. Nat'l Bank & Trust Co.*, 585 F. Supp. at 1388 (stockholder also acting as guarantor of loans); see also *Costner v. Blount Nat'l Bank*, 578 F.2d 1192, 1195 (6th Cir. 1978) (shareholder of injured corporate borrower had standing to complain of diminution in value of stock shares).

211. *Shulman v. Continental Bank*, 513 F. Supp. 979, 984 (E.D. Pa. 1981); see also *Campbell*, 781 F.2d at 443 (assignee of borrower's leasehold rights lacks standing); *Duryea v. Third Northwestern Nat'l Bank*, 606 F.2d 823, 825-26 (8th Cir. 1979) (no claim where plaintiff never dealt directly with bank, but instead signed notes promising to repay money borrowed by third party from bank and loaned by that party to plaintiff); *Delta Diversified, Inc. v. Citizens & S. Nat'l Bank*, 171 Ga. App. 625, 320 S.E. 2d 767, 770 (1984) (wives of borrowers, who acted as sureties on their husbands' loans, were not "customers" of lending bank and thus could not rely on Act as defense).

CONCLUSION

Because of their importance to the American economy, banking institutions and other parts of the financial industry have on occasion been held to different standards under the antitrust laws. For example, more relaxed standards apply to bank mergers than govern unregulated industries; on the other hand, greater restrictions on conditional transactions in the banking industry apply. For the most part, courts have recognized that competition is as important in the banking industry as elsewhere in the economy, and thus generally similar standards prevail. A recognition of the different nature of the financial industry and of the occasional limitations therein on unbridled competition, however, will help in understanding this occasional special treatment.

